MAJLIS PERBANDARAN PULAU PINANG *a*

v.

SYARIKAT BEKERJASAMA-SAMA SERBAGUNA SUNGAI GELUGOR DENGAN TANGGUNGAN *b*

FEDERAL COURT, KUALA LUMPUR
EDGAR JOSEPH JR FCJ
MOHAMED DZAIDDIN FCJ
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: 02-6-1996(P)] *c*
26 MAY 1999

ADMINISTRATIVE LAW: *Remedies - Certiorari - Application to quash decision of Local Authority - Alternative remedy - Failure to avail of alternative domestic appeal remedy - Whether a valid ground for declining judicial review - Applicant raising an arguable case of abuse of power and issues of law of public importance - Whether judicial review appropriate - Town and Country Planning Act 1976, ss. 3, 4(4), 6(1), 8, 22, 23, 24(5)* *d*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Local Authority - Planning permission for housing project - Local Authority imposing new condition for extension of planning permission - RM25,000 price limit for houses - Whether Local Authority committed an error of law - Whether decision unreasoanble and disproportionately oppressive - Whether an abuse of power - Whether decision vitiated by bias - Town and Country Planning Act 1976, ss. 3, 4(4), 6(1), 8, 22, 23(1), 24(5)* *e*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Doctrine of severence - Administrative act - Judicial review of - Whether distinction should be made between that which is void and that which should be cured by judicial review - Decision sought to be impugned - Whether must be correctly identified* *f*

LOCAL GOVERNMENT: *Town planning - Housing project - Planning permission - Local Authority imposing new condition when extending planning permission - Whether an error of law - Whether an abuse of power - Whether vitiated by bias - Doctrine of severence - Applicability - Power to enlarge time - Whether court could enlarge time for extinct planning permission - Town and Country Planning Act 1976, ss. 3, 4(4), 6(1), 8, 22, 23(1), 24(5) - Courts of Judicature Act 1964, art. 8 to Schedule thereto* *g* *h*

STATUTORY INTERPRETATION: *Section 24(5) Town and Country Planning Act 1976 - Scope and efficacy - Whether giving unlimited power to Local Authority to impose any licencing condition it wishes* *i*

The respondent co-operative society ('the Society') had sought to develop its land in Penang and build thereon 183 units of flats for sale to its members ('the Project'), and had applied to the appellant ('the Council') *inter alia* for a planning permission. In June 1991, in an effort to implement its policy regarding low cost housing, the Council asked the Society to allocate 30% of the Project to low cost houses "to be sold at a cost not exceeding RM25,000 per unit". The Society rejected the request, but had not appealed against the same. Be that as it may, on 6 September 1991, the Council granted planning permission for the Project. Seven conditions were attached to the planning permission, but none, however, concerned price.

In December 1991, the Society intimated that it would sell each of the two-bedroom and three-bedroom flats at RM38,000 and RM62,000 respectively ('the new prices'). The Society's members objected to the price hike, and jointly petitioned the Council, but the Council refused to intervene saying in their letter dated 24 February 1992 that 'pricing' was an internal matter of the Society and that the Council had no authority to interfere with it. It thus came about that the Society thereafter proceeded to sell and had sold some 103 units of the flats at the new prices.

The planning permission was due to expire on 5 September 1992, and that being so, on 2 September 1992, the Society applied for its extension. The Council did not consider the application until about ten months later, when, on 20 July 1993, it granted the extension sought for, *albeit* for only 47 days. The short extension aside, the Council also invoked s. 24(5) of the Town and Country Planning Act 1976 ('the Act'), and imposed thereto additional conditions, including that the Society was "to complete 30% low-cost at RM25,000 per unit" ('the disputed condition'). The Society sought a review of the disputed condition, but the request was rejected by the Council on 20 September 1993. No reason then was given by the Council for imposing the disputed condition or for refusing to review, and nor had it heard the Society before imposing the disputed condition.

The Society alleged that 'the decision of 20 September 1993' was unreasonable, ultra vires and vitiated by *mala fide*, and so applied for an order of *certiorari* to quash the same. The application was dismissed by the High Court, upon the ground that the Society's failure to avail itself of an alternative domestic appeal remedy under s. 23(1) of the Act was fatal to its application for judicial review. A further ground was that the Council, by virtue of s. 24(5) of the Act, had not lacked jurisdiction to impose the disputed condition.

On appeal, however, the Court of Appeal ruled that it was proper for the Society to have opted for judicial review in the circumstances. The Court of Appeal was also of opinion that the Council's decision of 24 February 1992 was a clear representation that the Society was not pegged to selling its units at prices not exceeding RM25,000, and that the Council was estopped from changing that decision so as to adversely affect the Society. However, while holding that the Council had committed an error of law in imposing the disputed condition on 20 July 1993, and in failing to abrogate it, the Court of Appeal considered it proper to invoke the Doctrine of Severence, and sever the disputed condition from the planning permission granted on 6 September 1991. The court, in the circumstances, nullified only the disputed condition and extended the lifespan of the planning permission for another year. Dissatisfied, the Council appealed to the Federal court.

The facts also showed that due to the need to evict squatters on the land, including a dweller by the name of Rabeah, the Society had to engage in some negotiations with a Council Member by the name of Ahmad Miftah Khan ('Khan'), who happened to be Rabeah's uncle. The Society, in the event, offered Rabeah a two-bedroom flat for free, but the offer was rejected by Khan who wanted a three-bedroom flat for his niece. Khan had however sat and participated at every meeting of the Council at which the Society's planning permission was discussed. Before the Federal Court, the Council appealed on a number of grounds, including: (i) whether the Society's application for judicial review was barred by non-exercise of the internal appeal procedure (ii) whether the Council had power to impose the disputed condition, and if so, whether it had lawfully exercised that power (iii) whether the Council's decision of 20 July 1993 was vitiated by bias by virtue of the Khan factor (iv) whether the Court of Appeal was right in applying the Doctrine of Severence the way it did.

Held:

Per Edgar Joseph Jr FCJ

[1] It is a matter of the first importance for a party seeking judicial review to correctly identify the decision sought to be impugned, as failure to do so could be fatal. In the instant case, the intended target of the application for *certiorari* was clearly the disputed condition. However, the Council's decision on 20 July 1993, which imposed the disputed condition, and which was appealable under s. 24(3) of the Act or open to challenge by *certiorari* proceedings, was not made the target of the application for *certiorari*. What was sought to be impugned was the Council's decision on 20 September 1993, which was mistakenly referred to as the decision "imposing the additional condition" when, in fact, it was merely a decision rejecting the appeal and reaffirming the disputed decision.

[1a] Although the Society's application for *certiorari* did not correctly identify the relevant decision to be quashed, the decision of 20 September 1993, nevertheless, was **prejudicial** to the Society and also involved a **public element**. That being so it was open to challenge in *certiorari* proceedings. It follows therefore that the error in identifying the decision imposing the disputed condition herein was of no consequence.

[2] The Society's application for judicial review was not barred by its non-exercise of the internal appeal procedure. The Society had raised an arguable case that the Council, a public body, had acted unfairly and had abused its powers, and judicial review, therefore, would be the appropriate route to follow rather than appeal. Judicial review was also appropriate because the Society had raised issues of law of public importance. The Society was raising for the first time the question of how local authorities ought to exercise their licencing functions under a particular statute, and it was in the public interest that the court should give a ruling which would provide authoritative guidance for all local authorities. The instant planning case also involved a housing project the object of which was to provide homes for members of a co-operative society. Since many of the flats to be erected had been sold, a swift means of redress was indicated and judicial review would be the natural choice of remedy rather than appeal. Lastly, it ought also to be noted, that unless there are special circumstances governing a particular case, notwithstanding a privative clause of the "not to be challenged, etc." kind, judicial review will always lie to impeach all errors made by an administrative body or tribunal, and of inferior courts.

[3] Generally, the Council has power when granting an application for planning permission or extension or further extension thereof, to impose a planning condition to give effect to affordable housing as proclaimed in its guidelines. This power, however, was not unlimited, and this was so notwithstanding that s. 24(5) of the Act confers a wide discretion upon the Council to attach such conditions as they "think fit". Its exercise must be within proper limits, and towards this end, the Council must ensure that the the conditions are not "unreasonable" and kept within the four walls of legitimate planning goals.

[4] The concept of legitimate expectation has not only an impact on *procedure* but also a *substantive* impact. In the circumstances, the Court of Appeal was right when, touching upon how the legitimate expectation of the Society had a *procedural* impact, the court held that the Council should have given advance notice of its intention to impose the disputed condition because the rules of natural justice demanded it. As a matter

of fairness, reasons should have been given by the Council as to why it was imposing the disputed condition and thus resiling from the original approval of planning permission which was free from any pricing condition.

[4a] The *procedural* aspect aside, the original planning permission, which did not carry with it the disputed condition, also gave the Society a *substantive* right. That being so, the Court of Appeal was equally right in saying that there was here an estoppel, as the Council's decision of 14 February 1992 was a clear representation that the Society was not pegged to selling its units at prices not exceeding RM25,000. The Society had relied on the representation and had sold the units at the **new prices**. And since the Council was aware of these prices and had stated that the prices were an internal matter for the Society, it was not open to the Council to change its decision so as to adversely affect the Society.

[5] Upon the background facts as found by the Court of Appeal, and the applicable law, the severity of the requirements of the disputed condition was also clearly out of proportion to extension of planning permission sought. Reason and justice, hence, point to the conclusion that the Council's exercise of power herein was vitiated by both unreasonableness and abuse. The expression "abuse of power", however, must only be taken to mean that the Council had mistakenly acted in a manner which was not permitted by their powers.

[6] Khan's personal interest in the outcome of the application for extension of planning permission was sufficient to lead to his *automatic disqualification* from participating at the relevant meetings of the Council. In any case, the conduct and behaviour of Khan were such that the Society had clearly succeeded in establishing a real danger of bias under the Rule in *R v. Gough*, in other words, a case of *non-automatic disqualification*. This being the case, the whole of the decision of the Council dated 20 July 1993 extending the planning permission granted to the Society on 6 June 1991 and imposing the disputed condition was wholly null, void and of no effect.

[7] The disputed condition cannot be severed from the rest of the planning permission so as to leave the planning permission standing subject only to the remaining conditions. The source of authority for the grant of extension of planning permission and the imposition of the disputed condition was the decision of 20 July 1993. Therefore, since this decision was invalidated by the Khan factor, the whole of the decision is null and void, with the inevitable result that source of authority for the

extension of planning permission and the imposition of the disputed condition is gone.The court must therefore quash the decision of the Council, which properly understood is a composite one, thereby leaving the Society with no planning permission.

[7a] There is nothing in the Act, or for that matter in any other written law, which enables time to be enlarged by the court as to an extinct planning permission. The sole repository of this power is the Local Authority by virtue of s. 24(5) of the Act and no one else. Therefore, neither the Court of Appeal, nor for that matter any court, had the power to make the order of extension of time, as was done by the Court of Appeal herein.

[8] In the exceptional circumstances of this case, the entire matter of the Society's application for extension of planning permission must be referred back to the Council with a direction to reconsider and redetermine it according to Law **after** the Society has been afforded a reasonable opportunity to adduce evidence and make representations with respect to conditions, if any, to be imposed upon the grant of such extension. It goes without saying that Khan, assuming him to be still a Councilor, shall not vote or be even present at the meeting at which the application is being deliberated upon.

[8a] It would not, however, be open to the Council, upon reconsideration of the Society's application, to re-impose the disputed condition or to impose any other pricing condition to the like effect, because, to do so would be to unreasonably exercise or abuse its powers or be unduly oppressive; and more particularly, it would be a violation of the legitimate expectations of the Society that it would retain or receive the benefit of extension of planning permission, free from any such condition, which expectation the court will not allow to be thwarted. There is also here an estoppel arising from the conduct of the Council.

[Appeal partly allowed; order accordingly.]

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Local Housing Developers Act (Control and Licensing) Regulations 1989, regs 3(6), 5(5)(a), 10, 11
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For the appellant - Dato' Dr CV Das (Karin Lim & Lim Hock Siang with him); M/s Presgrave & Matthews
For the respondent - RR Sethu (R Rajasingam with him); M/s R Rajasingam & Co

[Appeal from Court of Appeal; Civil Appeal No: P-02-58-1994]

Reported by WA Sharif

JUDGMENT

Edgar Joseph Jr FCJ:

The Background Facts

The essential facts on which this appeal turns may be stated briefly thus:

The Respondent to this appeal Syarikat Bekerjasama-sama Sungei Gelugor Dengan Tanggungan Berhad ("the Society") is a Co-operative Society registered under the Co-operative Societies Act, 1948. The Society was the registered proprietor of certain land comprised in Lot 006099 Mk. 13 D.T.L. Sungei Gelugor, Pulau Pinang ("the Land"), in area 1.9 acres, with road frontage along Jalan Helen Brown, George Town, Penang.

On 22 March 1987, at the Annual General Meeting ("the A.G.M.") of the Society, it was resolved by its members that low-cost flats should be built on the Land and the flats thus built be sold to members or their dependants. For this purpose, an architect Mr. Lawrence Loh ("the Architect") was employed to design, prepare and submit all necessary documentation and plans for a proposed single storey block of 10-storey flats, each with a built-up area of 700 sq. ft., to include 183 units of flats and 7 units of shops ("the Project"), with a view to obtaining planning approval from the Appellant, the Majlis Perbandaran Pulau Pinang ("the Council").

Pursuant to the resolution aforesaid, on 21 April 1990, the Society entered into a Joint-Venture Agreement ("the Agreement") with a licensed housing developer known as Rethico Sendirian Berhad ("Rethico"). The portions of the Agreement, so far as material to this case, were these:

First of all, the preamble provided that:

(1) Rethico had a license to develop the Project under the relevant legislation.

(2) The Society had applied for planning permission to construct 190 units, being 183 units of flats and 7 units of shops, and would endeavour to obtain the maximum density of 100 units per acre; and

(3) Rethico would pay the Society RM900,000 if and when planning approval was obtained for construction of the 190 units.

The other material provisions of the Agreement were these:

(1) the Society appointed Rethico to develop and manage the Project;

(2) the premium of RM900,000 would be paid by Rethico to the Society in instalments;

(3) the Society undertook to find purchasers for all the 190 units;

(4) the selling price of a two-bedroom flat, measuring an average of 500 sq. ft., shall not exceed *RM32,000* and, a three-bedroom flat, measuring an average of 650 sq. ft., shall not exceed *RM45,000* (Italics supplied);

(5) 100 units were to be two-bedroom flats, 74 units to be three-bedroom flats, 5 units to be shop-houses and 12 units would be shop lots outside the block of flats;

(6) the Society would be a party to all contracts of sale of the individual units;

(7) the Society and Rethico undertook to comply with the relevant requirements of the Housing Developers (Control and Licensing) Act, 1966; more particularly, Regulations 5(5)(a), 10 and 11 of the Housing Developers (Control and Licensing) Regulations, 1989:,

(8) Rethico undertook not to charge the Land but to use its own financial resources to complete the Project.

The Society's application for planning permission having been lodged, the Council responded by letter dated 18 June 1991, requiring the Society to amend its plans within two months to comply with the requirements of the Town and Country Planning Department and certain other Government Departments. A copy of this letter was extended to the Architect.

The requirements of the Town and Country Planning Department aforesaid were enumerated in a separate enclosure entitled "Kehendak-kehendak Perancangan Bandar". Item 5 of these requirements specified that the permitted density was 60 units per acre. The Society's proposed density, however, was

99.06. Item 6 expressed the hope that Rethico would comply with the Council's Garispanduan-garispanduan mengenai rumah pangsa murah Majlis ("Guidelines for Low Cost Flats"). Item 8 of the Guidelines specified that a Co-operative Society was entitled to a density of 100 units per acre. In the context of this case, Item 11 was especially important; freely translated, it specified "that 30% of the low cost houses have to be built and sold at a cost not exceeding RM25,000 per unit in accordance with Government Policy".

The documentary evidence adduced in the High Court, Penang, included a publication entitled "Dasar-dasar/Garispanduan-garispanduan". In a foreword by the Secretary of the Council, it was said that these Guidelines were published for the benefit of the public to inform them of the planning and building requirements of the Council. Pages 2 and 3 carried the Guidelines and were said to have been passed on 7 December 1978 and 12 March 1983; they consisted of nine items. Some of the items worth mentioning are Item 1 which provided for a density of 60 units per acre, Item 2, which provided that the area of each unit should not exceed 700 sq. ft. and Item 4 stipulated that the cost of each unit should be about RM25,000 – in the words of the Guideline – "Hendaklah lebihkurang $25,000 bagi tiap-tiap satu unit". The word "lebihkurang" was nowhere defined.

The Court of Appeal, quite pertinently, asked "If around RM25,000 was the right price on 12 March 1983 what should the price have been in 1991?", and went on to add, again, quite correctly, "lebihkurang" obviously permitted some flexibility which should take into account price fluctuations in the economy. Then, there was Item 9 which said that on an ad hoc basis the Council would consider applications for increased density subject to a limit of 100 units per acre.

On 13 August 1991, the Architect responded seriatim to the Council's letter dated 18 June 1991, details of which need not detain us, except, as regards two matters: firstly, he prayed for an increased density of 100 units per acre and as regards the all-important Item 11 regarding pricing – he said this:

"Syarat ini telah dinotakan di atas pelan. Ingin dimaklumkan bahawa syarat ini telah dinotakan di bawah bantahan. Pehak pemaju akan merayu terhadap syarat ini kemudian." (Freely translated, "This condition has been noted on the plan. Please be informed that this condition has been noted under objections. The developer will appeal against this condition later").

In fact, the Architect had mistakenly referred to Item 11 as a *condition* when in fact the Council had by their letter dated 18 June 1991 referred to it as one of the *"Requirements"*.

The next event requiring mention is that the Council had by a letter dated 7 September 1991 written to the Society stating that planning permission for the Project had been granted on 6 September 1991, which, of course meant that planning permission would expire on 5 September 1992. The letter also stated that 30% of the units were to be sold to bumiputras.

More particularly, planning permission was embodied in a separate document and was for one block of low cost flats consisting of 183 units and 7 shops all to be built on the Land. It was in Form C(1), prescribed under the relevant legislation, to wit, Rule 10(1) of the Planning Control (General) Rules, 1990, pursuant to s. 22(3) of the Town and Country Planning Act, 1976 ("the Act"). The permission granted was conditional, the conditions being seven in number, and it was said that they were imposed by virtue of s. 22(6) of the Act, which says this:

> (6) If planning permission is granted, whether with or without conditions, it shall be conveyed to the applicant in the prescribed form and at the same time a notice of the grant thereof shall be given to any person who has made any objection pursuant to section 21(6).

One of the seven conditions stipulated that the maximum permissible density was not to exceed 100 units per acre. Significantly, none of the remaining 6 conditions made any reference whatsoever to it being a condition that the price of the units should not exceed RM25,000 per unit or any other sum.

To recapitulate, Item 11 of the Council's List of Requirements dated 18 June 1991 stipulated the price per unit to be not exceeding RM25,000, and, the Society was careful to object categorically to this.

If, as the Court of Appeal observed, the Council considered the pricing requirement to be mandatory, it could easily have so stipulated when granting planning permission on 6 September 1991. It is, of course true, that Condition (vii) stated that the grant of planning permission was not to restrain or preclude the Council from imposing any requirement or condition at any time before the building plan was approved. We note the observation of the Court of Appeal that Dr. Das had conceded that the Council had been aware of the contents of the Agreement when planning permission was granted on 6 September 1991, in other words, the Council knew that the proposed sale prices under the Agreement was RM32,000 for a two-bedroom unit and RM45,000 for a three-bedroom unit.

The next event of significance occurred on 14 December 1991, when the Society and Rethico had entered into a Supplemental Agreement ("the Supplemental Agreement"). It recited in a preamble that an extra RM117,300 was payable to the Council *in lieu* of the open space and the additional "gerai" (external shops) approved on the layout plan and the rise in the cost of raw

materials and labour since the Agreement was executed and provided that having regard to these matters the selling price of the two-bedroom units should be increased to RM38,000 and the three-bedroom units to RM62,000 ("the new prices"). The Society's members were naturally informed of these new prices, with the result that they protested by way of a joint petition dated 12 December 1991, signed by 151 of them, addressed to the Council's President, the Director of Buildings, Council Members and the Director of Co-operatives. The gist of their grievance was that the Society was proposing to build flats on the Land at a cost exceeding RM25,000 which would come under the category of medium-cost houses, which the members could ill afford. The petitioners humbly prayed that a condition should be imposed stipulating that 75% of the units to be built should be sold at a price not exceeding RM25,000, in default, the Project should be scrapped. Notwithstanding this protest, the new prices were ratified at a Special Board Meeting of the Council held on 30 January 1992.

The important point to note here is that the joint petition made it obvious to all concerned in the Council that the Society would sell the proposed units at prices well in excess of RM25,000. Now, by virtue of condition (vii) of the planning permission aforesaid, it was open to the Council at that stage to have imposed a condition that the cost of 30% of the units should not exceed RM25,000 each, yet it studiously refrained from doing so.

What followed thereafter was that the layout plan was formally approved on 21 February 1992 and three days later, the Council's Director of Buildings wrote to the Society's Architect, with copy to the Society, to say that he had been directed to refer to the joint petition aforesaid and had to advise the Architect and the Society that at a meeting of the Council held on 13 February 1992, it had been decided that the Council had no authority to make any decision with regard to the prayer regarding pricing in the joint petition and, so could not intervene in the matter which, consequently, had to go back to the Society for it to determine the same.

Clearly, by their letter of 24 February 1992, the Council had made a categorical representation that the question of pricing had to be determined by the Society and its members as a domestic matter. By this time, the Society and Rethico had sold no less than 70 out of the 110 units at RM35,000 and 33 out of the 83 three-bedroom units at RM62,000.

At this stage, the situation on the ground was that Rethico had, in compliance with Regulation 3(6) of the Housing Developers Regulations, 1989, obtained a license to proceed with the development. But, it was unable to do so because a private caveat had been lodged against the Land and on which, we must add, were squatters. In the context of the squatter problem, it should be noted

that one of the requirements of the Council was that all existing erections on the Land would have to be demolished before development works could commence.

Now, as it happened, one of these squatters was a Rabeah binti Aboo Bakar @ Rabeah binti Abu Bakar ("Rabeah"). She was the occupant of a dwelling house No. 403, Sungei Gelugor and the niece of a certain Ahmad Miftah Khan ("Khan"), a member of the Council. The Secretary of the Council went on affidavit to say, in the High Court, that in an attempt to induce Rabeah to quit and vacate her dwelling house, the Chairman of the Society, had offered her two options but after taking time to consider, she had returned to say that Khan was her uncle and had advised her not to settle without his approval and that all negotiations should be conducted through him.

Looking ahead, subsequent events will show that Khan had, in fact, been present and indeed, had participated at every meeting of the Council at which the Society's planning permission was discussed – namely, on 6 September 1991, 20 July 1993, 5 September 1993 and 20 September 1993.

Going back a little, because by early September 1992, Rethico was unable to commence construction work and planning permission was due to expire on 5 September 1992, the Architect was obliged to apply in the prescribed form, supported by the necessary documentation, for first extension of time of planning permission.

There was much delay on the part of the Council in considering this application for first extension. It did not come up for consideration before the Council until 20 July 1993 – an unexplained delay of some ten months. Without giving the Society any notice that imposition of additional conditions was being considered, the Council, by letter dated 30 July 1993, conveyed the decision of the Council – made on 20 July 1993 – granting the first extension subject to additional conditions – which being freely translated – were in the following terms:

(1) the requirements of the J.K.R. must be complied with;

(2) the completion of 30% low-cost to be sold at RM25,000 per unit ("the disputed condition"). In its original form, in Bahasa Malaysia, it reads: "menyediakan 30% kos rendah atas harga RM25,000 seunit"; and

(3) the sale of the units are limited to members of the Society only.

The letter went on to state that the period of extension was from 6 September 1992 to 5 September 1993. Since the decision of the Council granting first extension was arrived at as late as 20 July 1993, this meant that extension was for a mere 47 days from the date of decision and it having been conveyed

to the Society by letter dated 31 July 1993 which came to hand on the next day, in practical terms, what this meant was extension in reality was for a mere 35 days – which passes all understanding. Another unsatisfactory feature of this part of the case was that although the original planning permission had lapsed on 5 September 1992, by 5 November 1992, the approved plan was still being processed to ensure compliance with technical requirements.

By para 3 of their letter aforesaid, the Council through its Planning Director, had repeated its reminder to the Society of the terms of s. 20 of the Act which provided:

> No person shall commence, undertake, or carry out any development otherwise than in conformity with the planning permission granted to him under section 22 in respect of the development or with the conditions of the planning permission.

In somewhat peremptory terms, the Council's letter aforesaid went on to say, that if and when the Society wished to apply for further extension of the period of planning permission, the application for the same had to be made before the expiry of the extension of planning permission granted and, of course, accompanied by the prescribed fees, ending with the caution that no further reminder would be sent for this purpose.

The Society's response to the Council's letter aforesaid was to appeal by a three page letter dated 10 August 1993, addressed to its Secretary, urging the Council to reconsider the disputed condition; in other words, to withdraw it. Copies of the appeal letter were extended to the Architect, the Director of Buildings and Rethico. The contents of this appeal letter are sufficiently important to merit particularisation.

First of all, it said that the Society was appealing to the Council to reconsider the disputed condition on the following grounds:

> (1) (a) the request was for extension of permission and not for planning permission for a new project;
>
> (b) the disputed condition would have retrospective effect and was, therefore, unfair.
>
> (2) (a) the Project was for a Co-operative Society and therefore, not a profit making institution. The Society had done much to promote the Co-operative movement in providing homes for its homeless members. The disputed condition would be repugnent to the Society's spirit of assisting Co-operative building programmes:
>
> (b) "Elaboration of para 2(a) supra";
>
> (c) the units were for sale to members and their family only and the issue of sale to outsiders did not arise.

(3) the cost of the units was fair i.e. RM35,000 for a two-bedroom unit and RM60,000 for a three-bedroom unit and, viewed from all angles, this was a low-cost building scheme:

(4) the buyers of these units were confined to Society's members who had already made substantial payments towards the cost of purchase;

(5) there was no such condition in the original planning permission and other material considerations were these:

(i) the Society had sold 70 out of the 110 two-bedroom units at RM35,000. The remaining 80 units were priced at RM60,000. This was at a time when there was no disputed condition.

(ii) the design and the cost could not now be amended to provide 30% low-cost (units) in the same building and to reduce the cost of the remaining unsold units would cause the Society financial loss;

(iii) the Society, prior to the imposition of the disputed condition, had signed the Agreement and Supplementary Agreement with Rethiko, which had obtained a Developer' s license and, compliance with the disputed condition would cause the Society to breach the same thus exposing it to claims for damages.

Of the 60 of the two-bedroom units sold, 10% of the purchase prices totaling RM347,909.21 had been collected. Copies of relevant bank statements were enclosed.

It is noteworthy that although the extension granted was due to expire on 5 September 1993, the appeal letter was only considered on 20 September 1993, rejected on the same day, and the result communicated by letter dated 23 September 1993, in somewhat abrupt terms, with no reasons given, to wit, that the appeal was rejected and that the two additional conditions i.e. 30% of the units to be sold at RM25,000 and sale to members only were re-affirmed.

At this point we would interpolate, to observe, that the appeal letter dated 10 August 1993 of the Society was not an appeal within the meaning of s. 23(1) of the Act, not being in the manner prescribed by Rule 4(2) of the Appeal Board Rules, 1989. It was, in truth, a mere letter to the Council to reconsider the imposition of the disputed condition. In a sense, it had no legal status. The significance of this point will appear at a later stage of this judgment.

To continue the narrative of events, while the Society's request for extension of planning permission was pending, the Society did not look askance at Rabeah's response that she would only negotiate the terms of settlement for her vacating her dwelling house through her uncle Khan. Indeed, the Council's

Secretary went on affidavit to say that on 3 May 1992 he had written a letter to Khan, with copy to Rabeah, to assist in the negotiations. This letter evoked a reply from Rabeah dated 13 June 1993, stating that she would only meet the Society's Secretary if Khan was present. The Secretary agreed to this. And so, it came about that on 15 June 1993, the Society convened a meeting, at which Khan attended as her spokeman.

The Council's Secretary went on to affirm that, at this meeting, Khan disclosed that he was a Municipal Councilor and so was in a position to jam the project if he wished to and demanded that Rabeah be given a two-bedroom flat free. This, of course meant, that an earlier offer by the Society of a 20% discount on RM35,000 to Rabeah was rejected.

According to the minutes of this particular meeting, there had been a lengthy discussion following which terms of settlement were reached, and these terms were formally ratified at a meeting of the Society's Board held on 25 August 1993.

But, although the Society's Secretary had, on 1 September 1993 sent a formal agreement in writing which incorporated the terms of settlement and duly executed by the Society, Rabeah did not sign the same. The explanation for this, according to the Council's Secretary, was that Rabeah had told him that Khan had told her not to sign until "the building plan was renewed" and also that Khan would be recommending additional conditions for the approved plan.

As for Khan's version – also on affidavit – he denied receipt of the Society's letters though he admitted attending the Society's Committee Meeting held on 15 June 1993 at which he did disclose to the members present that he was a Municipal Councilor but, explained, that the only reason why he did so was because he wished to make it clear that he was not present as a Municipal Councilor but in a purely personal capacity, and in particular, as an uncle of Rabeah. He emphatically denied any suggestion of impropriety on his part, in particular, he denied that he had abused his position as a Councilor. But, he freely admitted that he had, indeed, asked that Rabeah be given a free flat only because it was just but he denied that agreement as to this had been reached on 15 June 1993. The minutes of the Society on this point, he asserted, were an invention prepared for purposes of the case.

He went on to add that a week after the meeting on 15 June 1993 there had been another meeting between him and Rethico's representative at the conclusion of which it was agreed that Rabeah would be given a three-bedroom flat. Khan said that at the time he accepted this offer he had made it clear that building plans would have to be approved first and only thereafter should Rabeah's dwelling house be destroyed. He claimed that he had never spoken to Rabeah regarding the renewal of the plan or any additional conditions.

Whilst admitting that he had indeed participated at every meeting of the Council at which the Society's planning permission was discussed – namely, on 6 September 1991, 20 July 1993, 5 September 1993 and 20 September 1993 – he denied that he had in any way influenced the Committee to impose the disputed condition, which he said had been imposed to implement Government Policy. He claimed that no member of the Council knew about Rabeah's problems, that the provision of a free unit for Rabeah was wholly unconnected with the disputed condition and that he had made no attempt whatever to influence the other Councilors.

So much for the facts on the Muftah Khan factor. But as for the legal significance of these facts, we shall be considering the same at a later stage of this judgment.

In the meanwhile, it is relevant to note that s. 23 of the Act provides for an appeal against the decision of a planning authority to be made under s. 22(3); but it is clear that this remedy is not mandatory for the section deliberately provides that an appeal *may* be made to the Appeal Board within one month of the communication of the decision. Be that as it may, it was open to the Council to have refused to entertain the Society's appeal for reconsideration of the disputed condition, but instead it chose to do so, and having considered the same at its Planning Sub-Committee level on 5 September 1993 and at Main Committee level on 20 September 1993, rejected it.

Matters then came to a head, because on 11 October 1993, the Society commenced proceedings against the Council by way of an *ex parte* application for leave to apply for an order of *certiorari* to quash the disputed condition. In the High Court, at Penang, Abdul Hamid J directed that the hearing be *inter partes,* and so the application came for hearing on 11 November 1993 as an opposed *ex parte* application, ending in its dismissal on 16 December 1993.

Before Abdul Hamid J, the *grounds* upon which the Society relied to impugn the decision of the Council on 20 September 1993 as being a nullity were breach of the Rules of Natural Justice, *Ultra Vires,* Wednesbury unreasonableness, irrationality and *mala fides.*

The case for the Council was that it had ample power to impose the disputed condition and that this power was derived from the Act, related subsidiary legislation and State Government Policy reflected in directives, or circulars or otherwise.

The submissions advanced by Counsel for the Council were twofold; namely:

First, that the substantial decision sought to be quashed was made on 20 July 1993 and therefore the Society's application having been filed on 11 October 1993, was out of time, as more than 6 weeks had elapsed from the date of decision, that being the period limited by Order 53, Rule 1A.

Secondly, the Society's application was barred by the existence and non-exercise of the alternative internal appeal procedure provided for by s. 23 of the Act. In support the Federal Court judgment of *Government of Malaysia & Anor. v. Jagdis Singh* [1987] 2 MLJ 185 was cited.

In the event, Abdul Hamid J upheld the Council's second submission and, on that ground alone, he dismissed the application. He was of the view that it was open to him to decide the case on this basis even though the proceedings before him were for leave only.

We would interpolate to remark, that in this he was supported by the Court of Appeal decision in *R. v. Secretary of State for the Home Department ex. P. Swasti* [1986] 2 All ER 717 at 723, 724 per Donaldson, M.R. The Judge added that having regard to the language of s. 24(5) of the Act it had not been demonstrated that there was a clear lack of jurisdiction on the part of the Council when it imposed the disputed condition. In view of this conclusion, he did not consider it necessary to go into the conduct of Khan but, did add, that he failed to see any nexus between that conduct and the disputed condition which had been imposed in accordance with State Government Policy.

From that decision of Abdul Hamid J, the Council appealed to the Supreme Court. The issue of the effect of the non-exercise of the alternative internal appeal procedure was a specific ground of appeal in the Memorandum of Appeal and was fully argued. At the conclusion of arguments on 28 February 1994, without reserving judgment, the Supreme Court reversed the decision of Abdul Hamid J, and granted the Society leave to appeal for *certiorari* and directed that the substantive motion be heard before another Judge – who, as events turned out, was Azmel Hj. Maamor J. The Supreme Court did not render Grounds of Judgment in writing – a fact which will call for comment later.

The substantive motion having been filed on 14 March 1994, there were, before the Judge, eight affidavits filed on behalf of the Society and nine on behalf of the Council. Not deterred, the Council once again raised the objection of non-exercise of the internal appeal procedure, and that this was fatal to the Society's application.

The Society's first response to this objection was that it was barred by *Res Judicata* by reason of the decision of the Supreme Court aforesaid, and so, it was no longer open to the Council to raise it. The case was heard on 18 and 19 July 1994. The Judge directed further submissions on the internal appeal procedure point.

In the interval, the Council filed two more affidavits while the Society filed one more. Additional submissions in writing were lodged by both sides.

The next important date was 5 August 1994 when the Judge dismissed the application accompanied by his reasons for decision which were reflected in his notes of proceedings, in the following terms:

> **Mahkamah:** After having heard Counsels of both Parties earlier and having read the order of the Supreme Court, I am of the view that the decision of the Supreme Court on 26th February 1994 was merely to give leave to the application for *Certiorari* by the Applicant and to have the case heard before another Judge on the entire merits of the application. From that said order of the Supreme Court attached I am convinced that it did not decide on the issue of domestic remedy that was raised by the Respondent.

Clearly, the sole ground upon which the Judge dismissed the application was the internal appeal procedure point.

Against that decision, a Notice of Appeal was lodged on 12 August 1994, whereupon on later date, the Judge supplied Grounds of Judgment in writing dated 7 October 1994, which supplemented his reasons for decision announced in Open Court on 5 August 1994 as reflected in his note of proceedings quoted above.

Before us, and also before the Court of Appeal, the question was raised whether the Grounds of Judgment dated 7 October 1994, supplied by the Judge after the Notice of Appeal was filed should be disregarded as being supplementary grounds; so that the only judgment which called for consideration was the one pronounced in Open Court on 5 August 1994 as reflected in the Judge's note of the proceedings.

The Court of Appeal found that delivery of two judgments was undesirable but held that no injustice was occasioned to the parties since the appeal was by way of re-hearing and so, it would have to tackle afresh all issues raised in the High Court. It therefore considered the matter afresh and took into consideration, as well, the Grounds of Judgment dated 7 October 1994.

Before us, Counsel for the Society took the same point, but at the same time added that nothing serious turned on this issue. The stance of Counsel was, perhaps, understandable as one of the questions of Law regarding which leave to appeal was given, concerned what we may call, for brevity and convenience "the two judgments point".

In view of our conclusions on the issues which we propose to deal with, the approach of the Court of Appeal concerning the "two judgments point" – which we consider was the right approach – and the fact that the matter is

not of great moment, given the circumstances of the case, we do not consider it necessary to deal with the "two judgments point".

Another point which was raised before us and the Court of Appeal, was the *Res Judicata* Point by reason of the decision of the Supreme Court dated 28 February 1994.

It is unfortunate, as the Court of Appeal pointed out, that the Supreme Court in allowing the appeal against the decision of Abdul Hamid J and giving the Society leave to apply for *certiorari* with a direction that the substantive motion be heard by another Judge, did not give reasons in writing for doing so. It is therefore not possible to say, with certainty, on what ground the appeal was allowed.

The Court of Appeal was of the view that if the Supreme Court had decided that the availability of the alternative remedy was fatal to the case for the Society it would not have allowed the appeal. The Court of Appeal also pointed out the obvious fact that the order of the Supreme Court which is reproduced in the judgment of the Court of Appeal required consideration of *all* issues raised in the substantive Motion.

We recognise that the issue of whether the non-exercise of the internal appeal procedure provision was fatal to the case for the Society was fully argued before the Court of Appeal, it was one of the issues regarding which leave to appeal to this Court had been granted, and pursuant to that we did hear full argument on the point, which undoubtedly is a point of great public importance, as the Court of Appeal remarked. We therefore consider it desirable that we should determine it.

Having said that, we must add that the issues or questions of Law in respect of which leave to appeal was granted were multifarious, and in some ways, interlocking.

Subject to what we have said regarding the "two judgments point" – for brevity and convenience, these questions and our answers thereto are sufficiently reflected in this judgment and so the questions need not be specifically set out in the form that they took when leave to appeal was granted.

Identifying The Impugned Decision

It is right to say, at the risk of being trite, that administrative law is much concerned with the legality of procedures leading up to a decision and, of course, of the decision itself. It is therefore a matter of the first importance to correctly identify the decision sought to be impugned. Furthermore, when the date on which a decision is made is important, it may be necessary to

know which of a series of acts constituted the effective decision for the purpose of the scheme in question. The same is true where statute allows an appeal to be brought from a decision. Failure to observe these basic requirements could have fatal consequences as the following authorities will serve to illustrate:

In *Co-operative Retail Services Ltd. v. Secretary of State for the Environment* [1980] 1 All ER 449, the Secretary of State fixed the date on which an inquiry was to be held pertaining to an appeal to him. The plaintiff had applied to the Secretary of State to postpone the date of the inquiry, but the Secretary of State declined the request, whereupon, the plaintiff applied to the court for the refusal to be quashed. The question then arose was the refusal "a decision by the Secretary of State on an appeal"? If it was, then proceedings could have been brought. However, the Court of Appeal held that it was not. "Decision on appeal" would appear to mean a decision which disposes of an appeal, in contradistinction, to a decision in the course of an appeal.

Similarly, in *R. v. Immigration Appeal Tribunal, ex parte Lila* [1978] Imm AR 50, the Divisional Court had held that the "determination thereon" referred to the adjudicator's determination or decision on the appeal either allowing it or dismissing it. Consequently, in that case, an appeal did not lie to the Tribunal against an incidental or interlocutory decision arising in the course of an appeal.

So, also, in *Firestone Tyre and Rubber Company Ltd. v. Challoner* [1978] 1 ICR 175, where an industrial tribunal had found in May that C had been unfairly dismissed by F, made a recommendation of reinstatement and then "adjourned for further consideration of the matter" – that is to say, the matter of the appropriate reliefs. In the month of October, the Appeal Tribunal assessed the compensation payable. Appeal lay to the Employment Appeal Tribunal – within forty-two days of the decision. As it happened, F's appeal from the finding of unfair dismissal was within forty-two days of the second hearing but more than forty-two days of the first hearing. The Tribunal said: "We see no reason why what was done here (sc. at the first hearing) should not be considered to be a decision, and not what (counsel) for the employers would like us to say it is – merely a finding."

With these observations in mind, we turn to examine the application for *certiorari* which eventually led to the appeal before us.

It is important to recognise that the application for *certiorari* by way of Notice of Motion was made pursuant to an order dated 24 February 1994 of the Supreme Court, granting leave to commence those proceedings, to have removed into the High Court, and to have quashed, the purported decision of

the Planning Authority of the Council, dated 20 September 1993 which, it was said, imposed the disputed condition.

More particularly, the first prayer in the Substantive Motion dated 4 March 1994, which the Court of Appeal granted was in these terms:

> an Order of *Certiorari* to remove into this Honorable Court and to quash the decision of the Council on 20/9/93 imposing the additional condition that 30% of the units must be allocated as low cost at RM25,000/- per unit on the Applicant's application for first extension of the planning permission for the purpose of constructing 1 block of 10 storey low cost flats on Lot 006099, Mk. 13, D.T.L., Jalan Ismail Negara, Pulau Pinang.

Clearly, the intended target of the Application was the disputed condition. But did the Application correctly identify the relevant decision to be quashed? To answer this question, it is necessary to examine the circumstances in which the decision imposing the disputed condition came into being. In doing so, a certain degree of repetition will be inevitable.

On 6 September 1991, pursuant to an application made by the Society to the Council for planning permission, statutory planning permission in the form prescribed by s. 22(6) of the Act was given by the Planning Authority of the Council for the Project as a low-cost housing project on its own land, being the Land, **not** for sale generally **but** limited to its members only. The planning permission given specified seven conditions imposed by virtue of s. 22(3) of the Act but none concerned price.

However, development had not commenced within one year from the date of planning permission – that being the life span of the approval unless extended by the Council pursuant to its powers under s. 24(5) of the Act.

Accordingly, the Society, through the Architect, applied for extension of planning permission, its application being dated 2 September 1992. But, it was not until 20 July 1993, that the Council granted this request for extension and that too, subject to imposition of a condition, which it will be recalled was that "at least 30% of the flats must be sold at prices not exceeding RM25,000/- ("the disputed condition") claiming that it was doing so pursuant to powers conferred by s. 24(5) of the Act. That, however, does not tell the whole story for notice of the grant of extension of one year, with effect from 6 September 1992, did not reach the Society until 31 July 1993, which meant, that the Council had only 35 days left to commence development work!

In these circumstances, the Society although dissatisfied with the imposition of the disputed condition chose not to appeal to the Appeal Board under s. 24(3) of the Act, but instead, while there was 20 days left for appealing, sent a letter dated 10 August 1993 addressed to the Council appealing for a

review or reconsideration of its decision imposing the disputed condition, at the same time, giving reasons why the disputed condition should not be imposed, to wit, that the units were sold and some of these, at RM60,000 per unit. On 20 September 1993 the Council refused the request for review, reaffirmed the disputed condition and on the same day conveyed that refusal to the Society, by letter dated 23 September 1993, by which time, of course, the appealable period under s. 24(3) of the Act had expired.

Dr. Das, for the Council, submitted that the Society's letter dated 10 August 1993 praying for a *review* of the Council's decision imposing the disputed decision was not an appeal under s. 23, read with s. 24(5) of the Act, to the Appeal Board constituted under s. 36, and indeed, Mr. Sethu for the Society himself submitted that the *refusal* by the Council to reconsider its decision to impose the disputed condition was not appealable under s. 23, read with s. 24(3) of the Act which provides that an appealable decision would be one granting or refusing planning permission or imposing a disputed condition. In our view, both these submissions by Dr. Das and Mr. Sethu are plainly correct.

An appeal to the Appeal Board pursuant to s. 23, read with s. 24(3) of the Act, must be in Form 2 prescribed by Rule 4(2) of the Appeal Board Rules, 1989. It was obvious that the Society's letter dated 10 August 1993 was not such an appeal.

Furthermore, the Council's decision on 20 September 1993 refusing *review* was, as Mr. Sethu rightly recognised, not an appealable decision under s. 23, read with s. 24(3) of the Act, but nevertheless, it was open to challenge in *certiorari* proceedings. We say so because, as Wade and Forsyth point out in the 7th Edn, of their book on *Judicial Review of Administrative Action* (at p. 634) "The question is whether some issue is being determined to some person's prejudice; and the court's ability to intervene has been increased by the new doctrine that decisions which are wholly non-statutory may nevertheless be reviewable wherever there is a 'public element'."

Having said that, it is pertinent to point out, that it was the Council's decision on 20 July 1993, granting first extension of the planning permission, which, imposed the disputed condition which was appealable under s. 24(3) or open to challenge by *certiorari* proceedings.

However, the Council' s decision of 20 July 1993 was not made the target of the Society's application for *certiorari.* Instead, as appears from the first prayer of the Society's Substantive Motion for *certiorari,* reproduced above, what was sought to be impugned was the Council's decision on 20 September 1993 which was mistakenly referred to as the decision "imposing the additional

condition that 30% of the units must be allocated as low cost at RM25,000 per unit", when, as we have pointed out, in reality, it was merely, a decision rejecting the appeal letter and re-affirming the disputed condition.

But, as we have indicated that refusal to review although a non-statutory decision was prejudicial to the Society and involved a public element. It was therefore open to challenge in *certiorari* proceedings. The error in identifying the decision *imposing* the disputed condition was, therefore, of no consequence. Indeed, Dr. Das quite rightly did not take this point.

The Questions For Determination

We must now embark upon a consideration of the questions of Law which arise for decision. They may be stated thus:

(1) Whether the Society's Application for *certiorari* was barred by illegality by reason of the fact that Rethico to whom the license under Regulation 3(6) of the Housing Developers Act (Control and Licensing) Regulations 1989, to proceed with the Project had been issued by the Controller of Housing, had not obtained an advertisement and sale permit as required under Regulation 5, for the sale of the units concerned ("the Illegality Point")?

(2) Whether the Society's Application for Judicial Review was barred by non-exercise of the Internal Appeal procedure ("the Alternative Domestic Remedy Point")?

(3) Is the Privy Council case of *South East Asia Fire Bricks Sdn. Bhd.* [1975] 2 MLJ 250 still good Law ("the *Fire Bricks* Point")?

(4) Did the Council have the power to impose the disputed condition stipulating that 30% of the units must be allocated as low cost at RM25,000 per unit on the Society's application for first extension of planning permission for the purpose of constructing 1 block of 10 storey low cost flats, on the said Land ("the *Ultra Vires* Point")?

(5) If so, was that power *exercised* unreasonably or abused ("the Exercise of Power Point")?

(6) Was there substance in the plea of Bias and, if so, what were the consequences ("the Bias Point")?

(7) If no, can the disputed condition be *severed* from the rest of the planning permission ("the Serverance Point")?

(8) Did the Court of Appeal have the power to extend the life of a lapsed planning permission ("the Extension of Time Point")?

(9) If no, what are the appropriate *Remedies ("the Remedies Point")*?

(10) Can the Council, upon reconsideration re-impose the disputed condition or impose a pricing condition to the like effect ("Consequential Matters")?

(1) The Illegality Point

It was objected that the project was illegal because no permit had been obtained for the sale of the units concerned and that since the license under s. 3(1) of the Housing Developers Act (Control and Licensing) Regulations 1989 had been issued to Rethico, an advertisement and sale permit should first have been obtained by it under Regulation 5. It was accordingly submitted, in the Court of Appeal, by Dr. Das for the Council, and also before us, that even if a case had been made out by the Society for Judicial Review, as a matter of discretion relief should be refused on the ground that the Society had not come to Court with clean hands. In support, the case of *Badat bin Drani v. Tan Kheat* [1953] MLJ 67 was cited.

Our Conclusion On Question (1) ("The Illegality Point")

The Court of Appeal disposed of this submission shortly, in favour of the Society, in the following words – with which we agree –

> With the greatest respect we cannot countenance this argument ... Section 2(2)(a) of the Housing Developers (Control and Licensing) Act 1966 categorically states that, 'Nothing in this Act shall apply to any society ... incorporated under any law relating to co-operative societies'. These sales were direct sales by the Appellant to its members and since the land was at all times vested in the Appellant the transfer of title would have moved from the Appellant to the purchaser. Rethiko was only being paid for goods and services rendered. There is nothing in this point.

(2) The Alternative Remedy Point

Did the existence of the statutory remedy of appeal and its non-exercise, in this case, exclude Judicial Review?

Before considering this question, we should like to make a preliminary observation regarding the stage at which the question of alternative remedies should be dealt with. There is no hard and fast rule about this. As we have said, the case of *R. v. Secretary of State for the Home Department ex p., Swati (ibid)* shows that the existence of alternative remedies would be a ground for refusing leave to apply for judicial review. It is also a ground for setting aside a grant of leave given earlier. (*R. v. Secretary of State for the Home Department ex p. Davendranath Doorga* [1990] COD 109). Again, the alternative remedies argument may be considered at the *inter partes* stage, even

if leave had been granted and not challenged (*R. v. Brentford General Commissioners, ex p. Chan* [1986] STC 65. At the final hearing stage, the court can consider the alternative remedies objection as a preliminary point (*R. v. Chief Adjudicating Officer, ex p. Bland,* The Times 6 February 1985) or at a later stage. (See, e.g. *R. v. Epping and Harlow General Commissioners, ex p. Goldstraw* [1983] 3 All ER 257).

To revert to the question posed regarding this part of the case, the Court of Appeal formulated the applicable principle in this country thus:

> The availability of an alternative domestic remedy will not shut out an application for judicial review where the complaint made to the Court is one of 'error of law' or 'abuse of power' going to the legality of the conduct of the inferior tribunal or other decision-making authority, unless the alternative domestic remedy was intended for and in fact constitutes a wholly adequate machinery for the just disposal of the complaint in question.

After some discussion, the Court of Appeal answered this question in the negative, that is to say, in favour of the Society.

To attempt a comprehensive definition of anything is difficult, if not impossible, and, the topic we are now dealing with is no exception.

At first blush, we were much impressed by the above enunciation of principle. But reflection reveals that it cannot be treated as though they are words taken from a statute nor as an all-sufficient acid test regard being had to the complexities of every case and to decided cases on the subject which show that the approach of the courts in the U.K. in this area has not been a consistent one.

The reason for this is that whilst in *theory* the courts, there frequently recite the incantation that alternative remedies must be exhausted before recourse may be had to Judicial Review, in *practice,* the courts are often much kinder to the applicant with a good case on the merits, who is faced with this hurdle to clear and will most probably entertain his application as an exception.

As Lord Denning MR observed in *R. v. Chief Immigration Officer Gatwich Airport, ex p. Kharrazi* [1980] 3 All ER 373, where an immigration officer's decision refusing the applicant permission to enter the U.K. was quashed, that it has been held on countless occasions that the availability of appeal does not debar the court from quashing an order by *certiorari,* citing *Ex p. Royko Homes (ibid)* and that *everything depends upon the facts of the case* (at p. 380). (Emphasis supplied)

As we have indicated, in the U.K., there has been some conflict of judicial opinion on the question of the court's approach to the question whether the existence of an alternative remedy is a valid ground for declining judicial review. On the one hand, for example, we find Glidewell LJ in *ex p. Waldron* [1986] QB 824 at 852 saying that in deciding on the choice of remedy in such a situation the court should take into account certain matters; to wit:

> Whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than procedure by way of judicial review; whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body; these are amongst the matters which a court should take into account when deciding whether to grant relief by way of judicial review when an alternative remedy is available.

On the other hand, there are other cases, notably, *R. v. Chief Constable of Merseyside Police ex p. Calveley* [1986] QB 424 at 433 which show that where there is an alternative remedy, judicial review will only be granted in exceptional circumstances per Donaldson MR. Yet, in this very case, judicial review was granted to police officers who alleged wrongful dismissal in a natural justice case which had nothing exceptional about it. Indeed, the police officers had previously lodged an appeal to the Home Secretary, and only later applied for judicial review. And, in *R. v. Secretary of State for the Home Department ex p. Swati (ibid)*, Donaldson MR repeated that in exceptional cases, which by definition ... defy definition "... judicial review may be resorted to notwithstanding the availability of alternative remedies".

Professor Wade reckons – and we respectfully agree – that the reality of the matter is that: when genuine grounds for Judicial Review are alleged, it is the refusal rather than the grant of relief which is the exceptional course. (See, 7th Ed. Wade and Forsyth *Judicial Review of Administrative Action* p. 725).

Professor Wade's view receives indirect support from the judgment of Laws J in the recent case *R. v. Secretary of State for the Home Department ex p. Capti-Mehmet* [1997] COD 61 where his Lordship enunciated seven propositions in the field of immigration where the applicant for judicial review had failed to exercise alternative appeal procedure. Most of the propositions appear to be of general application and therefore not confined to the field of immigration. One of these being that where the Court considers that the merits of the application are strong enough for the court to conclude that the applicant was denied "substantial justice" by the decision-maker whose decision is being impugned, then this fact will weigh heavily in favour of a finding of exceptional circumstances.

Thus, it is not difficult to cite an anthology of cases decided in the U.K. in a variety of areas, where judicial review has been granted notwithstanding the availability of an independent remedy: *R. v. Huntingdon D.C., ex p. Cowan* [1984] 1 WLR 501 (licensing appeal); *R v. Hillingdon L.B.C.. ex p. Royco Homes Ltd.* [1974] QB 720 (planning appeal); *R. v. Paddington Valuation Officers, ex p. Peachey Property Corp*. [1966] 1 QB 380 (rating appeal); *R. v. Leeds City Council, ex p. Hendry,* The Times, 20 January 1994 (appeal to justices); *R. v. Bristol Magistrates' Court, ex p. Rowle*s [1994] COD 137 (right of appeal to Crown Court); *R. v. Devon C.C., ex p. Baker* [1993] COD 253 (statutory complaints machinery).

Speaking generally, it is right to say, that if an applicant in judicial review proceedings can demonstrate illegality, that is to say unlawful treatment, it would be wrong to insist that he exhaust his statutory right of appeal where one is available. Why should illegal action be not nipped in the bud by the quicker, more convenient and adequate remedy of Judicial Review rather appeal? It is, of course, true that convenience in this context means convenience not only for the parties but also in the public interest. (*R. v. Huntingdon D.C., ex p. Cowan* [1984] 1 WLR 501 (a Licensing appeal).

Lord Bingham (now Chief Justice) spoke extra judicially when delivering a lecture to the Administrative Law Bar Association in the Parliament Chamber of the Inner Temple on 17 October 1990, and dealt, *inter alia*, with the principle that an applicant for judicial review may be denied relief if he has not exhausted other available and equally efficacious remedies in these terms (See, [1991] P.L. 64, 72):

> It is, however, my impression that at the stage of the substantive hearing this principle is more often proclaimed than applied, and I wonder if in practice the reality quite matches the rhetoric. There are not, to my knowledge, many cases where at this stage relief has been denied on this ground to an applicant who has established an abuse of power. If so, I am pleased because I do not find the arguments in support of the principle altogether convincing. Where Parliament has established a procedure for remedying grievances, it did no doubt intend those with a grievance to use it; but Parliament can scarcely have envisaged that such persons would have been the victims of unlawful, as opposed to unjustified, treatment. It is again true that the courts have plenty to do without speedily resolving disputes where alternative procedures exist; but the courts should be the last to complain if aggrieved citizens feel that they (the courts) are best fitted to recognise and remedy the consequences of unlawful conduct (*R. v. Panel on Take-overs and Mergers, ex p. Guinness plc* [1990] 1 QB 146, 177-178 (per Lord Donaldson M.R.). It would seem to me on the whole desirable that when unlawful conduct is proved before a court of justice, it should generally be willing to say so and grant relief, whether an equally convenient, beneficial and effectual alternative remedy exists or not.

In the same way, we find Mann J saying in *R. v. Secretary of State for the Environment ex p. Lee* [1985] 54 P & CR 311, at 322:

> There is no case of which I am aware in which the existence of an alternative remedy has been held to exclude the jurisdiction of this court in public law. I can see no reason why it should.

Having said that we recognise that there are certain classes of cases such as planning, employment cases and tax cases (See, e.g. *R. v. Commissioners for Special Purposes of the Income Tax Act ex p. Napier* [1988] 3 All ER 166, *R. v. Epping Forest DC ex p. Green* [1993] COD 81, where a statute provides for a specialised appeal procedure, and so the courts understandably may not grant judicial review but this is always subject, to the grant of review in certain cases for example, where an applicant is able to demonstrate excess or abuse of power, or breach of the rules of natural justice. (See, *Accountant in bankruptcy v. Alls of Gillock* [1991] SLT 765; *Macksville & District Hospital v. Mayze* [1987] 10 NSWLR 708.)

In this regard, in planning cases we have the case of *R. v. Hillingdon B.C. ex p. Royko Homes (ibid)* which shows that a planning permission vitiated by unreasonable condition may be quashed at once by *certiorari,* even though there is a right of appeal though this case should be compared with *Munich v. Goldstone RDC* [1966] 1 WLR 427 another planning case, concerning a caravan where the Court of Appeal held that the site owner could commence proceedings for a declaration that planning authorities enforcement notice was bad even though he had pleaded guilty to a charge of contravention of the notice in previous criminal proceedings.

Because it is of importance to the issue at hand, we should like to emphasise that we have not over-looked the point that planning cases come under an extensive appellate structure provided for by the Town and Country Planning Act, 1976. But, in our view, this does not prevent the Court in appropriate cases from entertaining an application for Judicial Review in a planning case where the statutory scheme provides no equally convenient remedy. (See, *R. v. Hillingdon L.B.C. ex p. Royco Homes Ltd. (ibid).* The dicta of Lord Widgery C.J. in *ex p. Royco Homes* at p. 729, to the effect that if a complaint raises a question of law which could be dealt with by appeal or by judicial review, the latter may be preferable on the ground that judicial review may be quicker than the appeal procedure. We regard this dictum as a valuable guide, notwithstanding an attempt to water it down by May LJ in *ex p. Calveley* (*ibid* at p. 436F).

But more to the point, in the present case, the main grounds on which the Society sought judicial review were based on distinct principles of public law or general issues of law, in particular, the Society had clearly raised an arguable case that the Council, a public body, had acted unfairly, abused its

powers, and had raised the general question of the extent to which representations can bind public bodies. These grounds involve a consideration of generalised principles of public law developed by the courts to control the exercise of power by public authorities and, as such, judicial review would be the appropriate route to follow rather than appeal. (See, e.g. *R. v. I.R.C. ex p. Preston* [1985] AC 835, *R. v. I.R.C. ex p. M.F.K. Underwriting Agencies* [1990] 1 All ER 91).

On a further ground also, in the present case, Judicial Review rather than appeal would be the appropriate route to follow because, by their application, the Society had raised issues of Law of *public* importance, going beyond the significance of the case itself. In other words, the principles involved in this case were more important than the case itself. So for example, in *R. Huntington District Council, ex p. Cowan* [1984] 1 All ER 58, Glidewell J permitted the applicant to proceed by judicial review to impugn a licensing decision rather than have recourse to the appeal procedure in a case where the applicant was raising for the first time the question of how the local authorities were to exercise their licensing functions under a particular statute. It was considered to be in the public interest that the court should give a ruling which would provide authoritative guidance for all local authorities. In our view, the present case, was such a case.

Other considerations which were relevant regarding this part of the case here were these: the issue in judicial review cases usually concerns the legal significance of established facts rather than resolving a disputed question of fact. Here, the issues which arose for decision were based substantially, if not wholly, on established or admitted facts, and so the only question was their legal significance.

Then again, the greater speed of judicial review as compared to appellate procedures is a factor which can rightly be put in the balance and weighed and tip the balance in favour of judicial review. (See, e.g. *R. v. Chief Constable of Merseyside Police ex p. Calveley (ibid).*

We were here concerned with a planning case involving a housing project the object of which was to provide homes for members of a co-operative society belonging to the less effluent section of society. It was not disputed that many of the flats to be erected had been sold. In such a situation, a swift means of redress was indicated and Judicial Review would be the natural choice of remedy rather than appeal.

Our Conclusion On Question (2) ("The Alternative Remedy Point")

We would answer this Question in favour of the Society, that is to say, the Societys Application was not barred by the non-exercise of the Internal Appeal Procedure.

(3) Is Fire Bricks Still Good Law?

For the sake of completeness regarding this part of the case, we must refer to a question in respect of which leave to appeal was given and it is this:

What is the scope and efficacy of the internal appeal procedure under s. 23 of the Town and Country Planning Act which provides for an appeal to the Planning Appeal Board and the circumstances in which judicial review could be invoked notwithstanding an outster clause?

The Town and Country Planning Act, 1976, does not, of course, carry an ouster of jurisdiction clause so that strictly it is not necessary for us to deal with this question.

But, in view of the importance of the issue, the fact that it was an issue regarding which leave to appeal was given and that the Court of Appeal did determine it, we feel that we should consider it.

The question posed would appear to be a double barelled question because there are two parts to it: the first raises the issue of the circumstances in which a question of law determined by an administrative body or tribunal will be reviewable notwithstanding internal appeal procedure, while the second raises the issue of the effect of an ouster clause on the jurisdiction of the Court to grant Judicial Review.

We have answered the first part of this question. We shall now consider the second part.

Despite the Privy Council case of *South East Asia Firebricks Sdn. Bhd. v. Non-metallic Mineral Products Manufacturing Employees Union & Ors.* [1981] AC 363 which preserved the distinction between error of law on the face of the record and an error of jurisdiction and Lord Fraser suggesting that the ouster clause would effectively oust the remedy of *certiorari* when an inferior tribunal such as the Industrial Court had merely made an "error of law" provided that the error of law did not affect the jurisdiction of the tribunal and its decision was not a nullity for such reasons as breach of the rules of natural justice, the Court of Appeal preferred the contrary view of the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 MLJ 317.

The facts in the *Fire Bricks* case are too well known to need repetition. Suffice it to say, that the Privy Council was there considering the Malaysian Industrial Relations Act 1967, s. 29(3)(a) of which provided:

> An award of the (Industrial) Court shall be final and conclusive and no award shall be challenged, appealed against, reviewed, quashed or called in question in any court of law.

After citing *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147, the Privy Council said this:

> But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective.

Thus, *Fire Bricks* maintained the distinction between error of law on the face of the record and an error of jurisdiction. The Privy Council thus refused to follow the opinion of Lord Denning (supported by Eveleigh J but opposed by Geoffrey Lane LJ) in *Pearlman v. Harrow School Governors* [1979] QB 56 that the distinction between error of law within jurisdiction and without jurisdiction should be discarded.

In particular, in *Pearlman* Lord Denning had said:

> I would suggest that this distinction should now be discarded ... The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and *certiorari* will lie to correct it.

Instead, the Privy Council preferred the conservative dissent of Geoffrey Lane LJ that the county court's error was within jurisdiction and not therefore subject to judicial review.

And so, as Professor R.H. Hickling has observed in his illuminating book on *Malaysian Public Law*, at p. 189, the *Fire Bricks* case has haunted Malaysian law for fifteen years until the Court of Appeal held in *Syarikat Kenderaan Melayu Bhd. v. Transport Workers Union* [1995] 2 MLJ 317, it was no longer good law. The Court of Appeal in that case was no doubt, encouraged to take that bold step by certain developments in the U.K., particularly, in the House of Lords, subsequent to the decision on *Fire Bricks*.

Nearer home, in *Enesty Sdn. Bhd. v. Transport Workers Union* [1986] 1 MLJ 18, 24 Mohamed Azmi SCJ speaking for the Supreme Court observed with satisfaction that: "Since then (the decision in *Fire Bricks*) legal opinion in England, particularly that of the House of Lords has not stood still. The suggestion of Lord Denning (in *Pearlman*) to discard the distinction between

error of law which affects jurisdiction and one which does not and thereby widening the scope of *certiorari* notwithstanding the existence of ouster clause had gained momentum". He referred to *In Re Racal Communications* [1980] 2 All ER 364 and *O'Reilly v. Mackman* [1982] 3 All ER 1124. He then adverted to the amendments made to the Industrial Relations Act (introducing section 33A) following *Fire Bricks* and said this:

"It would seem to us to that (s. 33A) ... indicates a clear intention to limit the severity of the ouster clause. It may also indicate the intention of the legislature to curtail the full impact of the Privy Council decision". It was at this point that he expressed the hope that:

> Perhaps the time will come for this court to consider the view expressed by Lord Diplock in the House of Lords in *Re Racal Communications Ltd.* and thereby open the way for the acceptance of Lord Denning's suggestion in *Pearlman v. Harrow School* in discarding the distinction between an error of law which affected jurisdiction and one which did not.

In a commentary, on Enesty, a noted academic lawyer in this country, Professor M.P. Jain said in the 2nd Edition of his book *Administrative Law in Malaysia and Singapore:*

> It will be a welcome change, and in consonance with contemporary judicial thinking, as and when the Supreme Court does away with the distinction between 'jurisdictional error' and 'error of law'. This author has been pleading for long for equating errors of law with jurisdictional errors.

It was against this background that there came the decision of the Court of Appeal in the *Transport Workers Union* case which, after reviewing the developments in the U.K. since *Fire Bricks,* concluded that *Fire Bricks* was no longer good law.

In the 3rd Edition of his book on *Administrative Law in Malaysia and Singapore,* Professor M.P. Jain (at p. 802) in criticising the *Fire Bricks* case, and speaking approvingly of the *Transport Workers Union* case, has made the pertinent point that "The difficulty with the *Fire Bricks* view was that a tribunal could misinterprete the law without worrying about court interference and the tribunal became the final judges of the law. This was contrary to the premise of the common law approach according to which the courts are the final judge of the law. Now by making "error of law" a part of "jurisdictional error", the distortions caused by the *Fire Brick*s case have been removed, and the Courts and not tribunals or the administration have become the final judge of the law."

We might as well add that it was Lord Diplock's view expressed in the *Re Racal (ibid)* and in *O'Reilly (ibid)*, that it is a constitutional principle of the highest order that it is the High Court that determines the meaning of legislation and not any other entity, that Parliament must be unmistakably explicit if it is to give any such power to any other entity and this had been so decided by *Anisminic.*

As is well known, Lord Denning's approach was supported by Lord Diplock in the House of Lords in *Re Racal Communications (ibid)* – decided 10 days after the Privy Council gave judgment in the *Fire Bricks* case – where he clarified that the breakthrough made by *Anisminic*, was that as respects *administrative tribunals and authorities* the old distinction between errors of law that went to jurisdiction and those that did not was, for practical purposes, abolished. In *Re Racal* was concerned with a challenge to the order of a High Court Judge under the Companies Act, 1948 authorising compulsory inspection of company books.

It was held by the majority, that the outster clause – s. 441(3) of the Companies Act, 1948: "The decision of the Judge of the High Court ... on an application under this section shall not be appealable", was effective to exclude the power of the Court of Appeal to review the High Court Judge's decision.

Lord Diplock did, however, cut down Lord Denning's statements quoted above for review of *inferior courts*. What Lord Diplock said was that where a legal error is made by an administrative tribunal or authority, there is a presumption that Parliament did not intend the administrative body to be the final arbiter of questions of law. However, so far as *inferior courts* were concerned, "the subtle distinctions ... that did so much to confuse English administrative law before *Anisminic* might survive" and the superior court conducting the review should not be astute to hold that Parliament did not intend the inferior court to have jurisdiction to decide for itself the meaning of ordinary words used in the statute involving, as many words do, inter related questions of law, fact and degree.

But, in an often quoted obiter in *O'Reilly v. Mackman (ibid)* (with which the other members of the House agreed), Lord Diplock appears to have explained *Anisminic* in these terms:

> A landmark decision ... which has liberated English public law from the fetters that the courts had heretofore imposed upon themselves so far as determinations of *inferior courts and tribunals* were concerned by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction and errors of law committed within their jurisdiction. The breakthrough that *Anisminic* made was the recognition by the majority of this House that if a tribunal ... mistook the applicable law as to the facts as it found them, it must

> have asked itself the wrong question, one which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination', not being a 'determination within the meaning of the empowering legislation, was accordingly a nullity.

In *R. v. Manchester Coroner, ex Tal* [1984] 3 All ER 240, the question for determination was whether the decision of a coroner was open to challenge in judicial review proceedings for jurisdictional error only, and Lord Goff LJ, relying on Lord Diplocks enunciation of principle in *O'Reilly v. Mackman (ibid)*, said that "Lord Diplock did not intend to say (in *Re Racal Communications*) that the *Anisminic* principle did not extend to *inferior courts* as well as to *tribunals*". It was accordingly held that all errors of law committed during the proceedings before the Coroner were open to review by the Court. Goff L.J. also said:

> as a mater of principle, the *Anisminic* principle applied to inferior courts, as well as to inferior tribunals, nevertheless we do not wish to be understood as expressing any opinion that the principle will apply with full force in the case of every inferior court.

Our Conclusion On Questions 3 ("The Fire Bricks Point")

Accordingly, we hold that Lord Denning's view in *Pearlman* is to be preferred to that of the Privy Council in the *Fire Brick's* case, which should no longer be considered good law. To hold otherwise would mean, as Profession Jain has pointed out, that a tribunal could misinterpret the law without worrying about interference and the tribunal would become the final judge of the law, thereby – in the words of Lord Diplock quoted above – violating the constitutional principle that it is the High Court which determines the meaning of legislation and not any other entity.

In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the "not to be challenged, etc." kind, judicial review will lie to impeach all errors of law made by an administrative body or tribunal and, we would add, of inferior courts. In the words of Lord Denning in *Pearlman v. Harrow School (ibid)* at p. 70, "No Court or tribunal has any jurisdiction to make an error of law on which the decision in a case depends. If it makes such an error it goes outside its jurisdiction and *certiorari* will lie to correct it".

(4) Did The Council Have The Power To Impose The Disputed Condition?

It would be more convenient if we divide our treatment of this question under the following sub-headings:

(a) The Rival Contentions:.

(b) The Relevant Statutory Provisions

(c) The Framework Principles:.

(d) The Development Plan;

(e) Is Affordable Housing a Permissible Planning Condition?

(f) Our Conclusion on this Question.

(a) The Rival Contentions

It was contended by Dr. Das that the Council was under a statutory duty to attach the disputed condition, to the first extension of planning permission, when it did, on 20 July 1993, and that this obligation was imposed on the Structure Plan. Dr. Das added that the Project being for the construction of low-cost flats, at all material times, the Society was well aware that it was under a corresponding obligation to comply with the disputed condition, that is to say, even before planning permission was given. Consequently, the Council was obliged to impose the disputed condition, when the Society applied for extension, especially so, since, to borrow the colourful words of Dr. Das, the Society, "by its Supplementary Agreement with Rethico had highjacked this project from a low-cost project to something else", not within the contemplation of the Council when planning permission was first granted.

This submission was, of course, strongly opposed by Mr. Sethu on grounds which for convenience, will appear at a later stage of this part of the judgment.

(b) The Relevant Statutory Provisions

It is axiomatic that local authorities are creatures of statute and their qualities and powers can only be derived by reference to what is express or implicit in the statutes under which they function (See, e.g. Lord Wilberforce in *Bromley L.B.C. v. G.L.C.* [1983] 1 AC 768, 813). We also recognise that the statutory scheme of the Local Government Act confers upon Local Authorities a distinct political function, to which the Courts, by application of ordinary principles of statutory construction should give effect. But, as against this consideration, the Wednesbury principles provide a tool by resort to which the Courts can confine Local Authorities to the four walls of their statutory mandate.

In the present case, the source of the power on which the Council relied for the imposition of the disputed condition was, of course, s. 24(5) of the Town and Country Planning Act, 1976, ("the Act") which provides:

> (5) In granting an extension or further extension of a planning permission under subsection (3), the local planning authority may impose such conditions on the planning permission as it thinks fit or vary the conditions originally imposed; and section 23 shall apply with the necessary modifications to the imposition or variation of conditions under this section as it applies to the imposition of conditions under section 22(3).

Appeal against decision of local planning authority.

Section 23 provides:

(1) An appeal against the *decision* of the local planning authority made under section 22(3) may be made to the Appeal Board within one month from the date of the communication of such decision to him, by –

(a) an applicant for planning permission aggrieved by the *decisio*n of the local authority to *refuse* planning permission or by any condition imposed by the local planning authority in granting planning permission; *and*

(b) a person who has lodged an *objection* pursuant to section 21(6) and is aggrieved by the *decision* of the local planning authority in relation to his objection.

(2) In considering an appeal, the Appeal Board shall hear the appellant and the local planning authority.

(3) After hearing the appeal, the Appeal Board may make an order –

(a) confirming the decision of the local planning authority and dismissing the appeal;

(b) allowing the appeal by directing the local planning authority to grant planning permission absolutely or subject to such conditions as the Appeal Board thinks fit;

(c) allowing the appeal by *setting* aside any planning permission granted; or

(d) allowing the appeal by directing the local planning authority to *remove or modify any condition* subject to which planning permission has been granted or to *replace* the condition with such other condition as the Appeal Board thinks fit.

Section 22(3) provides:

After taking into consideration the matters specified in subsection (2), the local planning authority may, subject to subsection (4), grant planning permission either absolutely or subject to such conditions as it thinks fit to impose, or refuse to grant planning permission.

(c) The Framework Principles

Taken at its full face value, the above provisions would appear to confer unlimited power on the planning authority to impose any condition it wishes, for example, because it considers the condition to be in the interest of the housing policy of the State Government. But, the matter must be probed further.

It is axiomatic that it is not merely from the statutory language that the Courts are able to infer the intention of Parliament for the Judges have over the years enunciated what have been called "framework principles". These principles are not to be seen in the words of the statute but which the Courts presume to have been Parliament's intention and which thus may be employed as an aid to statutory construction or as an assumed limitation on the ambit of the provision of the statute in question which, on the face of it here, appears to confer unfettered discretion.

In the field of local government law, just over 100 years ago, there is the case of *Kruse v. Johnson* [1898] 2 QB 91.

In that case, we find Russell CJ saying, at p. 99, that there could be cases where it would be the duty of the Court to condemn by-laws, as invalid because they are unreasonable. Answering the question, unreasonable in what sense? His Lordship said: "If for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*'."

Here, we see the idea of 'unreasonableness" encapsulating principles such as "partial or unequal operation" corresponding to the modern principles of equal treatment or "oppressive or gratuitous interference with rights."

We note that in the *Allnatt London Properties v. Middlesex County Council* [1964] 62 LGR 304, Glyn-Jones 3 in considering whether planning conditions were void as being unreasonable did use the word "unreasonable" in the sense defined by Lord Russel in *Kruse v. Johnson (ibid)* at pp. 99, 100.

Some 65 years later, we see Wilmer LJ saying in *Mixnam's Properties Ltd. v. Chertsey Urban District Council* [1964] 1 QB 214, a statutory power given to a Local Authority to attach conditions to the grant of a site license even though expressed in the widest terms, must be held to be subject to limitations in four well defined respects. In the words of his Lordship, these were:

(1) The conditions must not be such as to effect a fundamental alteration in the general law relating to the rights of the person on whom they are imposed, unless the power to effect such an alteration is expressed in the clearest possible terms. This is no more than an application of the general principle that no statute is to be construed as effecting a substantial alteration in the law beyond what it expressly declares: see *National Assistance Board v. Wilkinson*, [1952] 2 QB 648, for a very clear statement of the principle involved.

(2) The power to impose conditions must be limited by reference to the subject-matter of the statute – that is, the conditions must be such as fairly fall within the ambit of the statute. Thus in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government,* [1958] 1 QB 554, in relation to the analogous power to impose conditions conferred by section 14 of the Town and Country Planning Act, 1947, Lord Denning [sitting in the Court of Appeal] in an oft-quoted dictum said: 'the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development.' Subject to a difference of view as to what is the ambit of the Act in question here, this principle is accepted by both sides.

(3) The conditions must not be unreasonable, that is, such as Parliament clearly cannot have intended should be imposed. In this respect it seems to me that the construction of a statutory power to impose conditions should be approached in the same way as that of a power to make by-laws. The principles stated in *Kruse v. Johnson,* [1898] 2 QB 91, appear to me to be equally applicable. It is to be remarked that in that case Lord Russell of Killowen CJ was at pains to emphasise that in considering unreasonableness, by-laws made by a local authority ought to be 'benevolently' interpreted. In the light of this he went on to consider in what sense by-laws must be regarded as unreasonable before they can properly be held to be *ultra vires*. He said: 'If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded.' I would apply a similar test in considering the conditions sought to be imposed in the present case.

(4) Although I do not think it is strictly a question of *vires*, it must be accepted that a condition may be held void for uncertainty, and consequently unenforceable, if it is ambiguous or uncertain in its application. It is to be remembered that in the event of non-compliance with one of the conditions, penal consequences may follow. It is, therefore, important that the conditions sought to be imposed should be unambiguous and free from uncertainty.

Similarly, in *Newbury Council v. Environment Sec.* [1981] AC 578, 607-608, Lord Fraser said that to be valid, a planning permission must satisfy three tests; these were:

First, it must have a planning purpose. It may have other purposes as well as its planning purpose. But if it is imposed solely for some other purpose or purposes, such as furtherance of the housing policy of the local authority, it will not be valid as a planning condition: see *Reg. v. Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720. Second, it must relate to the permitted development to which it is annexed. The best known statement of these two tests is that by Lord Denning in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1958] 1 Q.B. 554 which has been followed and applied in many later cases. Lord Denning said, at p. 572:

> Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however, desirable that object may seem to them to be in the public interest' ... Thirdly, the condition must be 'reasonable' in the rather special sense of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223, 229. Thus it will be invalid if it is 'so clearly unreasonable that no reasonable planning authority could have imposed it' as Lord Widgery C.J. said in *Kingston-upon-Thames Royal London Borough Council v. Secretary of State for the Environmen*t [1973] 1 W.L.R. 1549, 1553.

Looking back, although the Act confers upon the local authorities a generous discretion to attach conditions upon the grant of planning permission as they "think fit", this power is not unlimited, for the Courts have demonstrated that its exercise must be within proper limits, and towards this end, they have insisted that the conditions are not "unreasonable" and kept within the four walls of legitimate planning goals. (See, *Report of the Committee on Administrative Tribunals and Inquiries* Cmnd. 218. para 316, Edmund Davies at 46).

A striking example of an invalid planning condition is afforded by the case of *Hall and Co. Ltd. v. Shoreham – by-Sea Urban District Council* [1964] 1 WLR 240, where the condition required the landowners to construct a strip of roadway along their entire frontage and to give public right of passage over it. The Court of Appeal held this condition to be unlawful because it did not fairly and reasonably relate to the development itself. The Court was of the view that although the object of the condition, namely, to widen the road, was in itself wholly reasonable, yet the conditions which had the effect of putting the expense onto the landowner by the use of planning powers were "so unreasonable that they must be held to be *ultra vires*". Indeed, the Court saw the imposition of the condition as an attempt by the planning authority to secure a widening of the adjacent road at the landowners' expense so as to avoid using the powers of the Highways Act, 1959 which would have required compensation to be paid to them.

On the other hand, in *Fawcett Properties Ltd. v. Buckingham Country Council* [1961] AC 636, a condition imposed by the planning authority restricting occupants of new cottages to persons employed in agriculture or forestry was upheld by the House of Lords as being within the policy of the Act.

The *ratio decidendi* of the *Fawcett* case was that the restriction of the occupation of the cottages to agricultural workers was designed to ensure that the provisions of the development plan were carried out. The use of the sites by city workers would not have been consonant with the object of the development plan (per Lord Denning at p. 680 and Lord Jenkins at p. 686).

The *Fawcatt* case also establishes that the local authority's power to impose conditions under s. 14 of the Town and Country Planning Act, 1947, is limited to the extent that they must fairly and reasonably relate to the permitted development. To put it another way, there must be a nexus between the permitted use and the conditions imposed.

We must now move on from general principles to the specific question for decision regarding this part of the case.

(d) The Development Plan

After a careful review of the statutory sequence by which a draft "Structure Plan" becomes a "Development Plan" for a relevant area, and after listening to the rival contentions of Counsel on both sides, the Court of Appeal concluded – in our view correctly – that the applicable Draft Structure Plan, 1987, in this case **did** come into effect on 20 December 1989 not only by virtue of the provisions of section 10(6) of the Act, but also having regard to the definition section 2 which refers to a "Structure Plan" having effect by virtue of section 10(6). (AR C, p. 910 last para).

Before us, it was argued by Counsel for the Society that the Structure Plan, the Malaysia Plan, and Cabinet Policy all have political objectives and these do not constitute legal requirements and are therefore not enforceable.

By way of illustration, it was said that planning requirements would relate to density, type of building, landscaping, aesthetic matters, and other matters such as green belt and environmental impact.

The question for decision regarding this part of the case, therefore, is: in considering an application for planning permission for development, what is the status and relevance of the Development Plan? It is not difficult to cite an authology of authorities on this question. Our choice is as follows.

By s. 22(2) of the Act, it is provided that in dealing with an application for planning permission, the local planning authority "shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular, *inter alia*, the provisions of the Development Plan." These statutory provisions are equivalent to s. 70(2) of the U.K. Town and Country Planning Act. In this context, the cases of *Kissell v. Secretary of State for the Environment* [1993] TLR July, 22 at p. 32. *Etherridge v. Secretary of State for the Environment* [1991] E.G.C.S. 28, *Good v. Epping Forest D.C.* [1994] 2 All ER 156 and *R. v. Westminister City Council, ex p. Monahan* [1989] 3 WLR 408 (the *Royal Opera House Covent Garden* case) are relevant and show that the Structure Plan has legal status and cannot be disregarded, as Counsel for the Society implied by his submission.

It is also obvious that the statutory requirement in s. 22(2) of the Act, "to take into consideration" to the provisions of the Development Plan does not mean that the local planning authority must slavishly comply with it. It will suffice if it considers the Development Plan without incurring the obligation to follow it. (See, Lord Guest in *Simpson v. Edinburgh Corporation* [1960] S.C. 313; *Enfield London Borough Council v. Secretary of State for the Environment* [1974] 233 E.G. 53). But, note the two situations – not material to the present case – where the planning authority would be debarred from granting planning permission (Sec. 22(4) of the Act).

(e) Is Affordable Housing A Permissible Planning Condition?

There was more substance in the submission of Counsel for the Society that it was outside the scope of the powers of the planning authority to impose a condition to the grant of planning permission stating at what *price* the Society could sell each flat as this would interfere with the freedom of contract and the right of the Society and its members. In support Counsel cited *Mixnam Properties v. Chartsey U.D.C.* [1965] 3 AC 735 HL; *Hatnell v. Minister of Housing & Local Government* [1965] AC 1134 and *R. v. Hillingdon Borough Council, ex p. Royco Homes* [1974] QB 720.

Our attention was drawn to the relevant Structure Plan which, we note, indicated the general strategic lines of development with, so to speak, "a broad brush". It contains a statement formulating the Local Authority's general policies in respect of the development and use of land in its area touching on social, economic and environmental considerations. More to the point, under a Chapter entitled "Housing", we note para (v) which says this:

(v) giving incentives for private developers to build low-cost housing:

It has been estimated that up to 30% of the island's households can only afford the low-cost housing units i.e. houses consisting $25,000 per unit and less. (See Appendix III, table II). The State Authority requires a certain proportion of housing units in private housing development schemes to be of low cost in view of the substantial need.

To complement, as well as, to consolidate this policy of low cost housing production, the Majlis Perbandaran Pulau Pinang shall give incentives to private developers in the form of the following:

a) granting of higher densities of development;

b) giving priority in plan processing and approval;

c) provision of standard building plans for low-cost flats and other low-cost housing units; and

d) reduction of development charges.

The next point to note in the present context is that by s. 3 of the Act, the State Authority is responsible for the general policies in respect of development and land use and is authorised, from time to time, to give directions to the State Planning Committee or any local planning authority, in which case, these bodies had to give effect to such directions and carry out the same.

It was alleged by the Director of the State Planning and Building Committee within the Council on affidavit (AR "B" pp. 473/474), and not disputed by the Society, that at the time when original planning permission was given by the Council in this case – on 6 September 1991 – the relevant guidelines or "Garis Panduan" for low-cost houses which spoke of the price as "lebih kurang RM25,000" (more or less RM25,000) had their origins in Federal Government Policy channeled through the State Authority, to be given effect to by the Council. The statutory underpinning for these matters can be seen from section 4(4) and 6(1)(c) of the Act.

By s. 4(4) of the Act, the functions of the State Planning Committee include the promotion in the State, within the framework of the national policy, the conservation, use and development, of all lands in the State. By s. 6(1)(c) the functions of the local planning authority shall include performing such functions as the State Authority or the State Planning Committee may from time to time assign. By s. 8(4), it is provided that in formulating the Structure Plan all current policies including social and economic policies would be relevant consideration.

Having said that, we must add that decisions by the Courts in the U.K. on the Town and Country Planning Act, on which the Act is based, show that the purposes pursued by a statutory scheme may not be static. At first the Act directed attention to physical criteria; to wit, matters such as access to the site, siting of the buildings, their height, bulk, set back, mass, design and external appearance. For example, in *East Barnett U.D.C. v. British Transport Commission* [1962] 2 QB 484 we find Lord Parker CJ observing that the "character of the use of the land, not the particular purposes of a particular occupier, was the affair of planning and so the planning authority could not seek to favour any particular occupant or class of occupant." With the passage of time, however, the emphasis in planning policy has changed and so we see Lord Scarman saying in the House of Lords in *Westminister City Council v. Great Portland Estates* [1985] AC 661 when considering the "character of the use of the land" it would be "inhuman pedantry to ignore the human factor" in planning.

Accordingly, on the one hand, we find the cases indicate that the identity of the occupier or class of co-occupier – whether rich or poor – was not a material planning consideration (see. e.g. *Fawcett Properties Ltd. v. Buckingham C.C.* [1961] AC 636).

On the other hand, Government policy has undergone a change with the result that "affordable housing" is recognised in policy guidelines issued by the Department of Environment in the U.K. as a permissible goal of planning. Cases recently decided in the U.K. show that "affordable housing" may be a material planning consideration. (See e.g. *Mitchell v. Secretary of State for the Environment* [1944] J.P.L. 916 (CA); *ECC Construction Ltd. v. Secretary of State for the Environment* [1994] E.G.C.S. 143).

Similarly, Grant in his book on *Urban Planning* [1982], at p. 337, in considering the question: what is a legitimate "planning" purposes and at what point does a purpose stray away from planning as to be "ulterior", says that simply to pursue a "housing" objective would not in itself necessarily take a condition outside the powers of the planning Acts, because land use planning is centrally concerned with the issues of adequacy and quality of housing accommodation.

The learned author goes on to refer to the case *R. v. Hilllingdon L.B.C. ex parte Royco Homes Ltd. (ibid)*, where Royco had been granted planning permission to build houses subject to conditions, two of which were that: (1) the dwelling houses to be first occupied by persons who had been on the Borough's housing list for twelve months and (2) should thereafter for a period of 10 years be rented to persons enjoying security of tenure under the Rent Acts. The Divisional Court upheld the argument of Counsel for Royco that

the purpose of these conditions was to relieve the local authority of part of its burden under Part V of the Housing Act, 1957, as housing authority, to provide homes for the homeless.

The learned author points out – we think persuasively, "The primary objection in the *Royco* case was therefore not that the housing motive was ulterior, but that the purpose was to shift a financial burden from the authority to the developer." We might add that *Royco* is, therefore, distinguishable from the present case because here, unlike there, there was no evidence that the Council had attempted to shift such a financial burden from itself onto the shoulders of the Society.

A separate question of interest is this: where it is clearly state policy to encourage local planning authorities to have regard to the provision of affordable housing but there is no specific provision in the Structure Plan for affordable housing, is the local authority debarred from having regard to affordable housing as a material consideration when considering and deciding upon an application for planning permission for residential development? This question was addressed in *ECC Construction Ltd. v. Secretary of State for the Environment and Carrick D.C.* [1994] 69 P & CR 51 (Gerald Moriarty, Q.C. sitting as a Deputy High Court Judge in the Queen's Bench Division). It was held:

> ... The fact that a material consideration was to be found outside the statutory policies did not mean that it was not capable of being of great weight. It was a matter for the Inspector's planning judgment, even where the consideration weighed so heavily as to justify refusal of permission even though the proposal was otherwise acceptable. Otherwise, there would be an effective bar upon any decision-maker who wished to have regard to any consideration not based on the development plan. It was also not in accordance with the principle that each case was decided on its own merits.

Our Conclusion On Question (4) ("The Ultra Vires Point")

We would therefore answer this question in favour of the Council, that is to say that *generally*, the Council has the power when granting an application for planning permission or extension or further extension thereof, to impose a planning condition to give effect to affordable housing as proclaimed in its guidelines.

The next question to which we must direct attention is whether, in the particular circumstances of this case, the Council had lawfully exercised its power when imposing the disputed condition to the grant of first extension of planning permission.

(5) Was The Power To Impose The Disputed Condition Exercised Unreasonably Or Abused?

This question covers a wide area and so, for the sake of clarity and convenience, our treatment of the various issues which arise for decision thereunder should be divided under the following sub-headings:

(a) The Law on this Point,

(b) What were the Facts on this Point?;

(c) The Legitimate Expectation Point;

(d) The Duty to Give Reasons Point;

(e) The Estoppel Point;

(f) The Proportionality Point;

(g) Our Conclusion on the Imposition of the Disputed Conditions.

(a) The Law On This Point

We would repeat that the Act, by s. 24(5) confers a wide discretion upon the local authority to attach conditions to the grant of planning permission as they "think fit". But, as we have said, the courts have not been thereby deterred from confining the exercise of this power within proper limits by requiring that the conditions are not "unreasonable" and kept within the four walls of legitimate planning goals. In the language of Lord Denning in *Pyx Granite Co. Ltd. v. Ministry of Housing & Local Government* [1958] 1 QB 554:

> The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that these conditions, to be valid, must fairly and reasonably relate to the **permitted development.** The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest.

At para 13-086 of de Smith (5th Edn.) there is, if we may say so, a most helpful summary of the three distinct ways in which power may be unreasonably exercised or abused:

(a) Where there is a defect in the decision-making process – in the way the decision was reached or the factors taken into account in reaching the decision. These include:

(i) decisions taken in bad faith;

(ii) irrational decisions – those which are arbitrary, or inadequately justified or reasoned;

(iii) decisions where relevant considerations are manifestly inappropriately balanced.

(b) Where there is an infringement of principles governing the exercise of power in a constitutional democracy. These include:

(i) the principle of legal certainty (which requires the fulfillment of legitimate expectations);

(ii) the principle of equality (which requires decisions to be consistently applied and prohibits the making of unjustifiable distinctions between individuals).

(c) Where the impact of the decision is oppressive or an unnecessarily onerous infringement of a persons's rights or interests.

(b) What Were The Facts On This Point?

It is with the above principles in mind that we examine the facts relevant to this issue.

Broadly stated, a cogent fact was that when granting original planning permission to the Society, in respect of the development concerned, the Council did *not* exercise its powers to impose the disputed condition. It did so only when granting extension of planning permission and that too, without giving *reasons* for *resiling* from its original stance or giving the Society an *opportunity to be heard* beforehand.

More specifically, the facts of prime importance, as found by the Court of Appeal (at pp. 912 para 2 to 913 para 1, A.R. "C") – with which we concur – were these:

> The crucial considerations here are that the Respondent knew on the 6th September 1991 that the proposed price was RM32,000 and RM45,000. The Respondent knew that the Appellant did not agree to requirement 11 in the Respondent's list of 18th June 1991 that the price should not exceed RM25,000. They also knew that these prices were a private internal arrangement between the members of a Co-operative and the party they had chosen as their developer. In other words the price had been agreed by the prospective purchasers through their lawfully elected representatives. With all this knowledge the fact is that the Respondent did **NOT** make it a condition then that 30% of the 183 flats (i.e. 55 flats) approved should be sold at a cost not exceeding RM25,000. The wording of section 22(3) of the Act makes it crystal clear that to amount to a **condition** it must be so incorporated as to make the planning permission granted subject to such condition, and that such condition must appear in the prescribed form [section 22(6)].

Taking the same point further, the Court of Appeal added (at p. 913 para 2, A.R. "C") – and again we concur:

> On the assumption that the Respondent has a power to impose such a condition that power was not exercised on the 6th September 1991. Nor was it exercised after some of the Appellant's members petitioned the Respondent that a further increase was proposed. Indeed the Respondent formally represented to the Appellant's members, its Architect and to the Appellant itself by letter dated 24th February 1992 that the matter had been considered at a Municipal Council Meeting no less, on the 13th February 1992 which had decided that the increase prices were purely an internal matter for the Appellant. The aggrieved members did not appeal nor did anyone else complain about this decision.

Dealing with the submission advanced by Dr. Das for the Council, regarding this part of the case, the Court of Appeal said (at p. 913, A.R. "C") – and we agree:

> The submission made by Mr. Das that because this project was described in so many words in the said planning permission as '1 block 10 storey low cost flats (183 residential units and 7 shop units' it necessarily followed that the units must be sold at not more than RM25,000 because low-cost means not more than RM25,000 cannot be right because such a view cannot be reconciled with the Respondent's Council's decision of the 13th February 1992.

It is of some importance, and therefore we repeat that although no reasons were given by the Council for the imposition of the disputed condition, at the time of imposition, reasons were later given. This was belatedly, after proceedings had been commenced in the High Court, and we find these reasons appearing in the affidavit in opposition to the application for *certiorari*, affirmed on 10 November 1993, by the Council's Planning Director Mr. Tan Theam Siew, according to whom, the imposition of the disputed condition was advantageous to the Society as it could now build an additional 55 units.

The Court of Appeal then embarked upon a detailed – and, in our view, justifiable – criticism of the reasons advanced by Mr. Tan Theam Siew, in the following terms (at pp. 920 para 2 to 921 para 2, A.R. "C"):

> What the Planning Director subsequently affirmed the second condition to mean is a matter for some astonishment. By July 1993 the Appellant had sold 70 out of the 110 two-bedroom units at RM35,000 each. So there were 40 left. Out of the 83 three-bedroom units it had sold 33 at RM62,000 each. The heading to the Respondent's letter dated 30th July 1993 imposing the second condition refers specifically to the said planning permission, this project of 190 units and the said Land. The plain meaning of the letter was that 30% of these units should be built and sold at RM25,000 per unit. The Appellant's appeal letter of 10th August 1993 makes it clear that this was the sense in which the

second condition was understood by the Appellant. It was pointed out that it was practically impossible to turn the clock back and fulfill such a condition. The Appellant pointed out that the format of the approved plans and its cost structure for the existing project could not be changed without great financial loss. The Respondent's Planning Director who replied on the 23rd September 1993 did not suggest that the Appellant had misunderstood his meaning. The rejection was unqualified and absolute, and the second condition was reaffirmed in the same terms.

After the proceedings were commenced, the Respondent's Planning Director filed an affidavit sworn on 10th November 1993. In this he stated that the intended meaning of the second condition was not that 30% of the 190 units should be sold below RM25,000 each but that since in accordance with State Policy '30% of low cost houses contributed must be sold at RM25,000 per unit' the Appellant was permitted to build a further 30% residential units for sale at RM25,000 excluding the proposed number of residential units which had been approved based on the maximum permitted density. He further stated that the Appellant had thus been given a choice of adding 55 residential units to the 183 units which had been permitted.

Then, commenting upon the legal consequences of the imposition of the disputed condition in the light of the affidavit of Mr. Tan Thean Siew, the Court of Appeal said (at p. 922 paras 1 & 2, A.R. "C") – and we agree:

Taken at face value what this means is that 238 units were now to be built on the said Land. Such a requirement would have violated section 18 of the Act and the Respondent's own statutory limitations on density which had a maximum of 100 units per acre. The entire project would thus have had to be radically altered because in accordance with the said planning permission, the R.C. plans, sewerage plans, plumbing and drainage had already been submitted on the basis of 190 units, and approved as such.

The point here is that the Appellant had not applied for a variation of the planning permission but only for an extension. It was too late to change the pricing of the existing 190 units. By seeking to compel the Appellant to build another 55 units, the Respondent was not granting an **extension** of the planning permission granted for 190 units, but forcing the Appellant to put up a new project for 238 units on the said Land.

Whilst the intentions of the Respondent in seeking to make available to the public low-cost flats at RM25,000 is quite laudable we do not think this is the right way to go about it.

So much for the facts on this point.

(c) The Legitimate Expectation Point

In upholding the Society's plea that its legitimate expectations had been violated, when the Council imposed the disputed condition, the Court of Appeal had reproduced and approved verbatim the passages in the judgment of Simon Brown L.J. in *R. v. Devon CC. ex p. Baker* [1995] 1 All ER 73, at pp. 88 and 89, as showing that the concept of legitimate expectations has not only an impact on *procedure* but also a *substantive* impact, in particular, that the original planning permission, which of course, did not carry with it the disputed condition, gave the Society a *substantive* right, which the Council was estopped from denying. Here is how the Court of Appeal put it (at p. 918 para 2, A.R. "C"):

> Taking this conccpt (Legitimatc Expectation) in the first sense the said planning permission granted the Appellant a substantive right. The Respondent's Council's decision of the 14th February 1992 was a clear unambiguous representation that the Appellant was not pegged to selling its units at prices not exceeding RM25,000. The Appellant relied on the representation and in accordance with its internal procedures fixed the **new** prices at which the units would be sold and proceeded to sell them. Since the Respondent was fully aware of these prices and had stated a Council's decision that the prices were an internal matter for the Appellant we are of the view that the Respondent was not entitled to change its decision so as to adversely affect the claimant. There is an estoppel here.

At this point, we would interpolate, to remark, that there had been a conflict of judicial opinion on the question whether the concept of legitimate expectations could (in appropriate circumstances) have an impact not merely on *procedure* but also on the *substance* of the decision.

On the one hand, Laws J. in *R. v. Secretary of State for Transport ex p. Richmond LBC* [1994] 1 WLR 74, 92-94 commenting on *R. v. Secretary of State for Home Department ex. p. Ruddock* [1987] 1 WLR 1482, observed that that case merely demonstrated that there may be circumstances in which it would be unfair to change a policy adhered to over time without giving those affected the right to a hearing.

On the other hand, Sedley J., in *R. v. Ministry of Agriculture Fisheries and Food, ex p. Hamble (Offshore) Fisheries Ltd.* [1995] 2 All ER 714, 723-732, took an opposite view, criticising the analysis by Laws J. of the decision in *Ruddock.*

Then came the very recent decision of the Court of Appeal in *R. v. Secretary of State for the Home Department, ex p. Hargreaves* [1997] 1 WLR 906, overruling the reasoning of Sedley J., and holding that a legitimate expectation does not have an impact on substance of the decision, and therefore the Court is not entitled to judge the merits or fairness of a decision.

Commenting on ex. p. *Hargreaves*, Supperstone and Goodie in their book on *Judicial Review* (2nd Ed.) have this to say (at para 6.37):

> Thus unless the House of Lords holds otherwise, in English Law, a legitimate expectation may confer a right to be heard before any change of policy or practice, but in relation to review of the substance of the decision will not constitute anything more than a factor to be taken into account when evaluating a challenge for unreasonableness.

The same would appear to be the position in Australia (see, *Attorney-General for New South Wales v. Quinn* [1990] 170 CLR 1; *Minister for Immigration and Ethic Affairs v. Teoh* [1995] 69 ALJR 423); and in New Zealand (see, *Northern Roller Milling Co. Ltd. v. Commerce Commission* [1994] 2 NZLR 747, criticised by Poole, *"Legitimate Expectations and Substantive Fairness: Beyond the Limits of Procedural Propriety"* [1995] NZ Law Review 426).

For our part, we prefer the view of Simon Brown L.J. in *Ex parte Baker (ibid)* and Sedley J. in *Ex parte Hamble (ibid)* as we find the reasoning there more persuasive. It is also a view which appears to be supported by de Smith, as the following extracts from his book, *Judicial Review of Administrative Action* (5th Edn.) indicate **(at para 13-034)**:

> Given the duty of a public body not to fetter its discretion under what circumstances will a legitimate expectation be protected in the face of a change in policy. Clearly, the change of policy must be 'a lawful exercise of discretion' (per Lord Scarman in *Re Findlay* [1985] A.C. 318, 338). The body's discretion to alter its policy must therefore be exercised after taking into account relevant considerations, and ignoring the irrelevant. The body must also pursue authorised and not extraneous purposes. These, considerations and purposes can include matters such as the need to maintain national security and matters of public policy. Nor should the discretion he exercised unreasonably – for example, simply in order to confound the recipient of the expectation, or in bad faith. The conduct of the recipient of the representation should not be relevant to a decision to revoke the representation.

After referring to the potential antithesis between the object of the protection of the legitimate expectation (legal certainty) and the object of the "no fettering" doctrine (flexibility) and observing that the issue may not always be resolved in favour of the latter, de Smith says **(at para 13-035)**:

> Although free to alter its policy, the authority is by no means free to ignore the existence of a legitimate expectation. Now that legitimate expectation has been accepted in Law as an interest worthy of protection, its existence becomes a relevant consideration which must be taken into consideration in the exercise of a discretion. It is placed on the scale and must be properly weighed.

Dealing with the balancing exercise, de Smith, says this (in the same para):

> The weighing is, as we have noted many times, a matter principally for the authority, but the courts may intervene where the expectation is entirely ignored or given manifestly improper weight (see, *R. v. Inland Revenue Commissioners ex p. M.F.K Underwiritng Agencies* [1990] 1 WLR 1545 per Bingham LJ when he said breach of an expectation may be unfair "particularly" if the promisee acted on it. Cf. the approach of Laws J in *Secretary of State for Transport, ex p. Richmond-upon-Thames LBC* [1994] 1 WLR 74). On other hand, in *R. v. Ministry of Agriculture, Fisheries and Food ex p. Hamble (Offshore) Fisheries Ltd.* [1995] 2 AER 714, Sedley J accepted the existence of the substantive legitimate expectation).

Continuing on the same theme, de Smith says this (at para 13-035):

> It is at this point that the fact that the promissee relied on the expectation to his detriment may be relevant. Detrimental reliance will add to the weight of the legitimate expectation. It may be overridden by competing public interest, but the greater the evident detriment to the promissee, the greater the countervailing weight of the public interest in order to override an expectation that is held to be legitimate.

Then, touching upon how the legitimate expectation of the Society had a procedural impact – this being the second category of the formulation of the distinct senses in which the concept legitimate expectations was employed by Simon – Brown LJ in *ex p. Baker (ibid)* – the Court of Appeal said this (at p. 919 para 1, A.R. "C"):

> In the second sense we think that the Respondent should have given advance notice of its intention to impose the second condition because the rules of natural justice demanded it. It is very possible that if a fair opportunity had been given to make representations the second condition would not have been imposed on the 20th July 1993.

Junior Counsel for the Council Miss Karin Lim drew our attention to Grant on *Urban Planning Law* (1982) at p. 252 where it is said that "*generally* it is accepted proposition that the rules of natural justice do not require local planning authorities to hold a hearing in determining applications". (Italics supplied)

It is significant that the author qualifies what he says by the word "*generally*".

The learned author goes on to say, on the same page and the following page, this:

> Ever since 1947 the pattern has been for the function of development control to be carried out by local authorities in the same way as any other committee function, informally and through debate rather than through adversarial proceedings; and the practice has never been challenged in the courts.

In support of this pattern the author cites the cases of *Hanily v. Minister of Local Government and Planning* [1952] 2 QB 444, 452, when Parker J. declined to imply any additional requirements of pre-condition notification and implicitly rejected the natural justice rules as inapplicable.

Also cited in support of this pattern is *Gaiman & Others v. National Association for Mental Health* [1971] Ch. 317 where Megarry J observed that thousands of planning applications are referred every year without any hearing, "yet I know of no suggestion that local planning authorities are thereby universally acting in contravention of the principles of natural justice".

Grant goes on to point out that the applicant's safeguard in his right of appeal was provided by statute.

In our view, generally speaking, these comments by Grant and the authorities he cites, do apply to planning applications, but not to the exceptional circumstances of the present case. We therefore agree with the Court of Appeal when it held, that the Council should have given advance notice of its intention to impose the disputed condition because the rules of natural justice demanded it. We also agree with its observation in the same para (p. 919 para 1, A.R. "C") that "it is very possible that if a fair opportunity had been given to make representations the disputed condition would not have been imposed on the 20th July 1993".

(d) The Duty To Give Reasons Point

Then, touching upon the *third sense* in which the concept of legitimate expectation is understood – as explained by Simon Brown L.J. in *ex p. Baker (supra)* – that people expect *fairness* in their dealings with those who make decisions affecting their interests the Court of Appeal said this (at p. 919, para 2):

> In the third sense we think that it cannot be said that the Respondent acted fairly in this case (we will come back to the question of bias and Khan's involvement later) because the decision making process is shown to be fatally flawed by the reasons which the Respondent's Planning Director Mr. Tan subsequently advanced to justify the imposition of the second condition.

We have said more than once, that when the Council, through its Planning Authority, imposed the disputed condition no reasons were given for it resiling from its earlier stance at the time original planning approval was given free from the disputed condition. And, this too, despite a plea from the Society to the Council, to review, its decision on 20 July 1993 to impose the disputed condition, if we may say so, on somewhat compelling grounds, as appears from the passages in the judgment of the Court of Appeal to which we have referred.

At this point, we should like to say a few words on the ambit of the duty to give reasons on the part of a decision-maker in the rapidly developing field of administration and where the courts exercise supervisory jurisdiction over the acts of subordinate authority.

In *Breen v. Amalgamated Engineering Union* [1971] 2 QB 175 at 191, Lord Denning observed that where a person "has some right or interest, or legitimate expectation of which it would not be fair to deprive him without a hearing or reasons given, then these should be afforded him accordingly, as the case may demand".

This principle has been applied in licensing cases. (See, e.g. *R. v. Wear Valley D.C., ex p. Binks* [1985] 2 All ER 699). It has also been invoked by the High Court, Penang, in *Rohana binti Ariffin & Anor. v. University Sains* [1989] 1 MLJ 487 where it was ruled that 'a reasoned decision can be an additional constituent of the concept of fairness.'

In *Doody v. Secretary of State for the Home Department* [1993] 3 All ER 92, the House of Lords did consider the question whether there was a general duty to give reasons in English Administrative Law. Lord Mustill speaking for the House said this (at p. 110):

> I accept without hesitation ... that the law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless it is equally beyond question that such a duty may in appropriate circumstances be implied ...

In *Doody*, the applicants who were prisoners sought judicial review of the determination by the Home Secretary under s. 35 of the Criminal Justice Act, 1991, which confers a discretion on that Minister as to whether or when to refer cases of prisoners undergoing mandatory life sentences to the Parole Board for review. The grounds upon which they relied was that in determining the penal element, the Home Secretary was obliged to give reasons if he departed from the period recommended by the judiciary. The House of Lords reversed the Court of Appeal on this point and granted the declaration prayed for. In doing so, the House grounded its decision on the requirement of fairness. Lord Mustill's speech made a wide ranging survey of natural justice jurisprudence generally and, in particular, the duty to give reasons. From, p. 325, of the report on *Doody*, we see that the requirement of fairness or natural justice depends upon the context of the decision.

As Michael Beloff Q.C. aptly put it in an interesting article based on a talk given recently to the Law Society of Singapore, published in the Law Gazette of the Law Society of Singapore of February 1999:

> Although a right to reasons has not yet been recognised as a pervasive aspect of fair procedure, it is becoming less an exception, than a rule subject to exceptions, not least because reasons enable the Court to exercise their supervisory role more effectively when they can detect whether a decision is or is not flawed by error. *Ex. Doody* [1994] 1 AC 531; *R. v. UFC ex p. Dental Institute* [1999] 1 WLR 242.

In the very recent and, as yet, unreported Privy Council case of *Dr. Stefan v. the General Medical Council,* decided on 8 March 1999, and reported in the Times of London, being an appeal from the decision of the Health Committee of the General Medical Council, under s. 37 of the Medical Act, 1983, Dr. Stefan had appealed from the decision of that body adjudging her fitness to practice to be seriously impaired and directing that her registration be suspended indefinitely. At the hearing before their Lordships' Board the sole question of Law which arose was whether there was any duty on the Committee to state their reasons.

The Committee's decision was in the following terms:

> Dr. Stefan, the Committee have carefully considered all the information presented to them and continue to be deeply concerned about your medical condition. The Committee have again judged your fitness to practise to be seriously impaired and have directed that your registration be suspended indefinitely.

After dealing with the question whether there was an express or implied statutory obligation in the relevant legislation for the Committee to state reasons for decision, their Lordships concluded that there was no express statutory duty to state reasons for its decision nor were they able to spell out an implied obligation to state reasons.

Nevertheless, their Lordships found that the Committee had the power to give reasons and added:

> that giving reasons can be beneficial and assist justice:- (1) in a complex case to enable the doctor to understand the Committee's reasons for finding against him; (2) where guidance can usefully be provided to the profession, especially in difficult fields of practice such as the treatment of drug addicts; and (3) because a reasoned finding can improve and strengthen the appeal process.

Their Lordships then turned to the alternative approach – that of the Common Law:

> In its most general form the argument proposes that there should be a general obligation on all decision-makers to give reasons for their decisions. The advantages of the provision of reasons have been often rehearsed. They relate to the decision-making process, in strengthening that process itself, in increasing the public confidence in it, and in the desirability of the disclosure of error

where error exists. They relate also to the parties immediately affected by the decision, in enabling them to know the strengths and weaknesses of their respective cases, and to facilitate appeal where that course is appropriate. But there are also dangers and disadvantages in a universal requirement for reasons. It may impose an undesirable legalism into areas where a high degree of informality is appropriate and add to delay and expense. The arguments for and against the giving of reasons were explored in the Justice-All Souls Report (Administrative Justice: Some Necessary Reforms, 1988). Another summary can be found in *R. v. Higher Education Funding Council, Ex p. Institute of Dental Surgery* [1994] 1 All ER 651, [1994] 1 WLR 242, 256.

The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current development towards an increased openness in matters of government and administration. But the trend is proceeding on a case by case basis (*R. v. Royal Borough of Kensington and Chelsea, Ex p. Grillo* [1996] 28 HLR 94), and has not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision-makers. It was reaffirmed in *Reg. v. Secretary of State for the Home Department, Ex p. Doody* [1994] 1 A.C. 531, 564, that the law does not at present recognise a general duty to give reasons for administrative decisions. But is it well established that there are exceptions where the giving of reasons will be required as a matter of fairness and openness. These may occur through the particular circumstances of a particular case. Or, as was recognised in *R. v. Higher Education Funding Council, Ex p. Institute of Dental Surgery* [1994] 1 WLR 242, 263, there may be classes of cases where the duty to give reasons may exist in all cases of that class. Those classes may be defined by factors relating to the particular character or quality of the decisions, as where they appear aberrant, or to factors relating to the particular character or particular jurisdiction of a decision-making body, as where it is concerned with matters of special importance, such as personal liberty. There is certainly a strong argument for the view that what were once seen as exceptions to a rule may now be becoming examples of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions. But the general rule has not been departed from and their Lordships do not consider that the present case provides an appropriate opportunity to explore the possibility of such a departure. They are conscious of the possible re-appraisal of the whole position which the passing of the Human Rights Act 1998 may bring about. The provisions of art 6(1) of the Convention on Human Rights, which are now about to become directly accessible in national courts, will require closer attention to be paid to the duty to give reasons, at least in relation to those cases where a person's civil rights and obligations are being determined. But it is in the context of the application of that Act that any wide-reaching review of the position at common law should take place.

We endorse the principles enunciated by the Privy Council in Dr. Stefan and say that in the exceptional circumstances of this case and having regard to the trend towards increased openess in matters of Government and administration, as a matter of fairness, reasons should have been given by the Council as to why it was imposing the disputed condition and thus resiling from the original approval of planning permission which was free from any pricing condition. In so holding, we should like to place special stress on the Council's earlier statement, when responding to a plea by members of the Society regarding pricing, that pricing was an internal matter and did not concern it. To put it mildly, the circumstances here were such as to cry out for an explanation from the Council as to its departure from its earlier stance, yet none was vouchsafed to the Society until after proceedings had been commenced in Court. That belated explanation, as we have already indicated, left much to be desired.

(e) The Estoppel Point

On the Estoppel point, we are conscious of the fact that generally courts are strongly protective of public authorities' freedom to discharge their powers unfettered. We are also aware of the general principle that an estoppel cannot be raised to prevent the exercise of a statutory discretion or to prevent or excuse the performance of a statutory duty (see, *Spencer Bower and Turner on Estoppel by Representation* 3rd Edition, p. 151): in the field of planning law, the application of this principle can be seen thus: under s. 22(2) of the Act, the Council as the planning authority had to determine applications for planning approval, and in doing so, would have to have regard to the provisions of the Development Plan and, of course, to any other material considerations.

Then again, as de Smith has pointed out in a passage quoted above, administrative power may be unreasonably exercised or abused, where the impact of the official decision is oppressive or an unnecessarily onerous infringement of a person's rights or interests.

De Smith illustrates his points by reference to cases decided in the field of planning law, when he says (at para 13.048)

> Town and country planning provides countless examples where planning conditions have been held unreasonable because of their unnecessarily onerous impact. Although the legislation permits the local authority, or the Secretary of State on appeal, to attach conditions to planning permissions as they may 'think fit' (Town & Country Planning Act 1990, s. 70(1)), conditions have been held unreasonable which, in effect, require the developer to dedicate part of his land for public use (*Hall & Co. Ltd. v. Shoreham-by-Sea U.D.C.* [1969] 1 W.L.R. 240) or otherwise require the developer to provide the off-site physical

infrastructure necessary to unlock the development (*City of Bradford M.C. v. Secretary of State for the Environment* [1986] J.P.L. 598). Similarly, a planning condition was held unreasonable which, in effect, required the developer to construct housing to local authority standards and rents, and to take tenants from the council's waiting list (*R. v. Hillingdon L.B.C., ex p. Royco Homes Ltd.* [1974] 1 Q.B. 720. Conditions attached to similar broad powers to license caravan sites were held by the House of Lords to be unreasonable because they were "a gratuitous interference with the rights of the occupier." (*Mixnam's Properties Ltd. v. Chertsey U.D.C.* [1965] A.C. 735). A condition attached to the reopening of a public inquiry by the Secretary of State for the Environment was held to be unreasonable because it resulted in "considerable expense, inconvenience and risk to the applicant." (*R. v. Secretary of State for the Environment, ex p. Fielder Estates (Canvey) Ltd.*, The Times, June 10, 1988. See also *Niarchos (London) Ltd. v. Secretary of State for the Environment* [1980] 79 L.G.R. 264). The Secretary of State's refusal to renew a temporary planning permission was struck down because it would be "unreasonably burdensome" on the applicant. (*Niarchos Ltd. v. Secretary of State for the Environment* [1977] 35 P. & C.R. 259).

Having said that, we agree with the following passage in the judgment of the Court of Appeal – A.R. "C" p. 918, para 2:

> Taking this concept in the first sense the said planning permission granted the Appellant a substantive right. The Respondent's Council's decision of the 14 February 1992 was a clear unambiguous representation that the Appellant was not pegged to selling its units at prices not exceeding RM25,000. The Appellant relied on the representation and in accordance with its internal procedures fixed the **new** prices at which the units would be sold and proceeded to sell them. Since the Respondent was fully aware of these prices and had stated a Council's decision that the prices were an internal matter for the Appellant we are of the view that the Respondent was not entitled to change its decision so as to adversely affect the claimant. There is an estoppel here.

(f) The Proportionality Point

It was no less an authority than Lord Diplock in the celebrated case of *Council of Civil Services Union v. Minister of Civil Service* [1985] AC 374 ("the GCHQ case") who, in classifying three grounds for judicial review, alluded to a possible fourth ground of "proportionality". Proportionality, of course, embodies a basic principle of fairness and we can see this principle at work in a number of English cases to which we shall presently refer, and we might as well interpolate, to add, that the doctrine was referred to as a ground for judicial review by Edgar Joseph (Jr.) FCJ in *R. Ramachandran v. The Industrial Court of Malaysia* [1977] 1 AMR 433 at 472-474.

We now turn to the English cases where the doctrine of proportionality is well illustrated.

In *Newbury District Council v. Secretary of State for the Environment* [1981] AC 578 planning permission had been given for the change of use of two of aircraft hangar buildings to use for storage purposes, subject to a stated condition that the buildings were, after 10 years, to be demolished. The buildings were eyesore being an undesirable intrusion into a rural landscape thus the condition was imposed for a planning purpose. The Lords did not find it necessary to consider whether the condition was Wednesbury unreasonable, but instead struck down the condition as it failed "fairly and reasonably relate" to the permitted development. Although proportionality was not expressly mentioned by the Lords as the test for determining the validity of the condition, it could be seen as implicit in their reasoning, considering that the removal of the buildings themselves could be seen as being out of proportion to the permission sought which was not for any building operations but merely for the change of use of two buildings from storing one kind of article to another.

In *Niarchos Ltd. v. Secretary of State for the Environment* [1977] 76 LGR 480 (D.C.) affords a clearer example of the doctrine of proportionality being used as a tool to test the validity of planning permission. In that case, the Secretary of State had refused permission for the continuance of office use in a residential area, where the only reasonable conclusion was that the conversion of the premises for residential use was unjustifiably expensive.

Indeed, the cost of conversion of the premises from office to residential use would have exceeded the capital value of the premises, with the result that the appellant company would have suffered undue hardship if the Secretary of State's decision were allowed to stand.

On appeal held, the High Court, contrary to the opinion of the Secretary of State, that the cost of conversion was relevant, and that it was unreasonable for the Secretary of State to insist on the implementation of a policy that would be "unreasonably burdensome" on the applicant. So here we see proportionality being used as a tool to test the validity of a refusal of planning permission. In particular in determining whether the discretionary power to grant or refuse planning permission had been exercised improperly or mistakenly, the Court carried out a balancing exercise, and concluded that because the company would have had to shoulder a disproportionate burden albeit in the implementation of a legitimate planning goal, the exercise of the power was rendered *ultra vires*.

The manner in which the basic principles of natural justice has been extended to include proportionality as a general principle of Law is clearly illustrated by *R. v. Barnsley Council ex p. Hook* [1976] 3 All ER 452, where the revocation of a stallholder's license was quashed. In so holding, Lord Denning

and Sir John Penniquick relied upon the principle of proportionality in support of one of the grounds; the revocation of the license as a punishment was out of proportion to the license holder Mr. Hook's wrongdoing which consisted of urinating in a side street of the market at a time when the market was closed and the public lavatories locked.

In our view, upon the background facts, as found by the Court of Appeal, with which we concur – and the applicable law, the severity of the requirements of the disputed condition, would be out of all proportion to extension of planning permission sought.

(g) Our Conclusion On Question (5) ("The Exercise Of Power Point")

In all the circumstances, therefore we would, answer this question thus: Reason and justice point to the conclusion that both limbs of this question – unreasonableness and abuse – must be answered in the affirmative, that is to say, in favour of the Society.

For the avoidance of doubt, we would add that by the expression "abuse of powers" we mean no more than that the Council had mistakenly acted in a manner which was not pemitted by their powers.

The next point we should like to address is the Issue of Bias. This is an issue of critical substance.

(6) Was There Substance In The Plea Of Bias And, If So, What Were The Consequences?

It would be more convenient if we divided the treatment of this topic under the following sub-headings:

(a) The Admitted Facts;

(b) The Test of Apparent Bias;

(c) The House of Lords Decision in *Re Pinnochet;*

(d) The Statutory Provisions Imposing Disability in the field of Local Government Law; and

(e) Our Conclusions on the Bias Point.

(a) The Admitted Facts

The Court of Appeal found – and we agree – that the following facts had been admitted by Miftah Khan:

(1) he is Rabeah's uncle;

(2) he attended a meeting of the Appellant ("the Society") on 15 June 1993;

(3) he did so to negotiate the best terms for Rabeah's vacating the site;

(4) he disclosed at that meeting that he was a Municipal Councilor;

(5) he rejected the terms offered by the Appellant ("the Society") and asked for a three-bedroom flat;

(6) he attended every meeting of the Respondent in which the Appellant's ("the Society") planning permission was discussed, i.e. 5 September 1991, 20 July 1993, 5 September 1993 and 20 September 1993 and participated therein.

We would interpolate to remark that although minutes were kept of the meetings aforesaid, none were adduced in evidence nor was any explanation vouchsafed to the Court by the Council for their non-production.

The Court of Appeal rightly recognised that since allegations of Khan's pressure and his denials were contained in contested affidavits, it was not possible to make any finding as regards those allegations without a trial, to determine where the truth lay.

(b) The Test Of Apparent Bias

The Court of Appeal then directed itself thus:

> What we are concerned with here however is not whether there was actual bias on the part of Khan but whether even if Khan was as impartial as could be, right minded persons would think there was a real likelihood of bias on his part. With respect we think Lord Denning's test in *Metropolitan Properties Ltd. v. Lannon* [1968] 3 All E.R. 304 at 309 is still the best.

To bring home the point to everyone concerned in public administration, the Court of Appeal then reproduced a lengthy passage in the judgment of Lord Denning in *Lannon* wherein were cited a number of authorities, ending with the famous words:

> ... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-mind people go away thinking: 'The Judge was biased'.

For ourselves, we note that the case of *R. v. Sec. of State, Ex p. Kirkstall Valley Company Ltd.* [1996] 3 All ER 304 shows that the principle of bias applies in the field of Planning Law.

Nearer home, we find that more than 60 years ago, the Court of Appeal of the Straits Settlements in *Alkaff & Co. v. the Governor-in-Council & Ors.* [1937] MLJ Rep 202, in the field of Local Government Law, granted *certiorari* to quash backlane orders made on the ground that the Commissioner of Lands, who as a member of the Singapore Improvement Trust had approved the backlane schemes, had subsequently as the officer appointed under section 144(1) of the Municipal Ordinance, inquired into the merits of the schemes, resulted in a *suspicion* that justice might not be done. The Commissioner of Lands was therefore disqualified from acting in the latter capacity, irrespective of his actual conduct of the inquiry.

What then is the correct test to apply in determining the limits of apparent bias? In the past, the authorities in the UK revealed an acute conflict of judicial opinion.

There were some Judges who preferred the "reasonable suspicion" of bias test (See, e.g. *R. v. Sussex Justices, ex p. McCarthy* [1924] 1 KB 256, *Hannam v. Bradford Corp.* [1970] 1 WLR 937, *R v. West Yorkshire Coroner, ex p. Smith (No. 2),* The Times, 6 November 1982, *R. v. Liverpool FF., ex p. Topping,* [1983] 1 WLR 119) whilst many preferred the "real likelihood" test (See, e.g. *R. v. Barnsley Licensing FF., ex p. Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167, *Hannam v. Bradford Corp,* [1970] 1 WLR 946, *Metropolitan Properties (F.G.C.) Ltd. v. Lannon,* [1969] 1 QB 577, *Steeples v. Derbyshire C.C.* [1985] 1 WLR 256.)

In *R. v. Liverpool City Justices ex p. Topping* [1983] 1 WLR 119, Ackner LJ observed that there is little if any difference between the two tests. With respect, we do not agree. Devlin J in *R. v. Barnesley Licensing Justices (ibid)* correctly pointed out that the different tests even if applied to the same facts may lead to different results.

The conflict of judicial opinion appears to have been resolved by the House of Lords in *R. v. Gough* [1993] AC 646, when the House applied "the real danger" of bias test in a criminal case, where a juror had recognised the accused's brother as her next door neighbour, but this was not until after the verdict and it was held there was no real danger of bias. Lord Goff, speaking for the House, made it clear that this was the test to apply in all cases of apparent bias, whether concerned with justices or other members of inferior tribunals, or with jurors or with arbitrators.

Explaining the "real danger" of bias test Lord Goff put it this way (at p. 670 F):

> Having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard "(or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."

Lord Goff went on to substitute "the opinion of the Court" for Lord Denning's "reasonable people" in *Lannon*. Here is what he said on this point:

> ... Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.

The *"real danger"* test favoured in *Gough c*ould be seen as a compromise between *"the reasonable suspicion"* of bias test and the *"real likelihood'* of bias test so as to stress that the Court is contemplating a lower standard than *"likelihood"* or *"probability of bias"*, that is to say, a *"real possibility of bias."* See, *Gough* at pp. 668 C–D, 670 E–F, per Lord Goff; p. 671 B–C, per Lord Woolf.

It is also important to note that the question of bias has to be answered by considering *all* the facts not merely by reference to the view of the hypothetical reasonable man (*R. v. Gough,* per Lord Goff, at p. 670 D to E).

Having given careful consideration to the matter we prefer the test of apparent bias given in *Gough* ("the real danger of bias" test) as this will avoid setting aside of judgments upon "quite insubstantial grounds and the flimsiest pretexts of bias".

(c) The Decision Of The House Of Lords In Re Pinochet

We must now direct attention to the very recent case of *R.v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Urgate (No. 2)* [1999] 1 All ER 577, cited to us by Mr. Sethu (who provided us with a copy of the report taken from the Internet), where the House of Lords, comprising Lord Browne-Wilkinson, Lord Goff of Chieveley, Lord Nolan, Lord Hope of Craighead and Lord Hutton, had on 15 January 1999, set aside its own order of 25/11/98 in an extradition appeal on the ground that Lord Hoffmann who was a member of the Court which made that order was a Director of AICL, a company wholly controlled by A1, a party to the appeal, which was arguing for the extradition of General Pinochet, the issue being:

Should Pinochet, a former Head of State of Chile be entitled to immunity from extradition process? Lord Hoffmann was a director of the charity AICL closely allied to A1 and sharing in this respect A1's objects.

It was held that the relationship between A1, AICL and Lord Hoffmann led to the *automatic disqualification* of Lord Hoffmann to sit on the hearing of the appeal without any investigation into whether there was a likelihood or suspicion of bias.

In the course of his judgment, the presiding Judge Lord Brown Wilkinson referred to the conflict of judicial opinion as to the correct test to apply when apparent bias is alleged and left open the question, whether the test in *Gough* needs to be reviewed (at p. 589 b to d):

> For the same reason, it is unnecessary to determine whether the test of apparent bias laid down in *Reg. v. Gough* ('Is there in the view of the Court a real danger that the judge was biased?') needs to be reviewed in the light of subsequent decisions. Decisions in Canada, Australia and New Zealand have either refused to apply the test in *Reg. v. Gough,* or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed members of the public that the judge was not impartial: see, for example, the High Court of Australia in *Webb v. The Queen.* It has also been suggested that the test in *Reg. v. Gough* in some way impinges on the requirement of Lord Hewart's dictum that justice should appear to be done: see *Reg. v. Inner West London Coroner, Ex Parte Dallaglio* [1994] 4 All E.R. 139 at page 152 A to B. Since such a review is unnecessary for the determination of the present case, I prefer to express no view on it.

Lord Hope after referring to the two tests where apparent bias was alleged, went on to point out that in *Gough,* Lord Woolf had explained that the aim of the "real danger of bias test" was to avoid quashing of convictions upon quite insubstantial grounds and the flimsiest pretexts of bias.

However, Lord Hope did not express any preference as to which of the two tests would be the correct test to apply but did add this (at p. 595 d to e):

> Although the tests are described differently, their application by the appellate courts in each country is likely in practice to lead to results which are so similar as to be indistinguishable. Indeed it may be said of all the various tests which I have mentioned, including the maxim that no-one may be a judge in his own cause, that they are all founded upon the same broad principle. Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty an unbiased and impartial mind. He must be seen to be impartial.

Lord Hutton, too expressed no preference as to which was the appropriate test to apply in cases where it was alleged that there was apparent bias. Here is what his Lordship said on the point (at p. 596 c):

> In relation to the allegation made by Senator Pinochet, not that Lord Hoffmann was biased in fact, but that there was a real danger of bias or a reasonable apprehension or suspicion of bias because of Lord Hoffmann's links with Amnesty International, I am also in agreement with the reasoning and conclusion of Lord Browne-Wilkinson ...

However, on the subject of automatic disqualification, Lord Hutton developed the rule whereby a Judge should, in certain circumstances, be automatically disqualified, when he said (at pp. 597 h to 598 b):

> Later in his judgment Lord Goff said at p. 664F, agreeing with the view of Lord Woolf at p. 673F, that the only special category of case where there should be disqualification of a judge without the necessity to inquire whether there was any real likelihood of bias was where the judge has a direct pecuniary interest in the outcome of the proceedings. However I am of opinion that there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation. I find persuasive the observations of Lord Widgery C.J. in *Regina v. Altrincham Justices, Ex parte Pennington* [1975] 1 Q.B. 549, 552F:
>
> > There is no better known rule of natural justice than the one that a man shall not be a judge in his own cause. In its simplest form this means that a man shall not judge an issue in which he has a direct pecuniary interest, but the rule has been extended far beyond such crude examples and now covers cases in which the judge has such an interest in the parties or the matters in dispute as to make it difficult for him to approach the trial with the impartiality and detachment which the judicial function requires. Accordingly, application may be made to set aside a judgment on the so-called ground of bias without showing any direct pecuniary or proprietary interest in the judicial officer concerned.

Next, we would observe that apart from the "bias" rule of natural justice to which we have referred, which is Common Law based, there are statutory provisions imposing disability from participating in particular decisions on members who have any pecuniary interest and requiring disclosure of interest. And, it is to this topic that we must next direct attention.

(d) The Statutory Provisions

The relevant statutory provisions of the Local Government Act, 1976, so far as this part of the case is concerned, are these:

> 34.(1) If a Councilor has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter, and is present at a meeting of the local authority or of any Committee thereof at which the contract or other matter is the subject of consideration, he shall, as soon as possible after the

commencement thereof, disclose the fact, and shall withdraw from the meeting while the contract or matter is under consideration:

> Provided that this section shall not apply to an interest in a contract or other matter which a Councilor may have as a rate-payer or inhabitant of the local authority area, or as an ordinary consumer of water, gas, electricity or other local authority services or to an interest in any matter relating to the terms on which the right to participate in any local authority service, including the supply of goods, is offered to the public.

Subsections (2), (3) and (5) of section 34 provide:

> (2) For the purposes of this section a Councilor shall be treated as having indirectly a pecuniary interest in a contract or other matter, if –
>
> (a) he or any nominee of his is a member of a company or other body with which the contract is made or is proposed to be made or which has a direct pecuniary interest in the other matter under consideration; or
>
> (b) he is a partner, or is in the employment, of a person with whom the contract is made or is proposed to be made or who has a direct pecuniary interest in the other matter under consideration;
>
> Provided that this subsection shall not apply to membership of, or employment under, any public body.
>
> (3) In the case of married persons the interest of one spouse shall, if know to the other, be deemed for the purpose of this section to be also an interest of that other spouse.
>
> (5) The Secretary shall record in a book to be kept for the purpose particulars of any disclosure made under sub-section (1) and of any notice given under subsection (4), and the book shall be open at all reasonable hours to the inspection of any Councilor.

Sub-sections (2) and (3) of s. 34, relied on by Dr. Das as suggesting that the rule of bias was limited to the relationships specified therein so that uncles and nieces are excluded, do not in our view have that effect. As Mr. Sethu says, these provisions are mere illustrations of certain close relationships which can offend the Rule against Bias, and are not intended to be an exhaustive definition provision. In our view, clearer words would be necessary to modify the Common Law Rule against bias.

(e) Our Conclusions On Question (6) ("The Bias Point")

In our view, on the facts admitted by Khan himself, personal interest in the outcome of the application for extension of planning permission made by the Society by reason – to quote the Court of Appeal – of his "championing the cause" of his niece Rabeah when negotiating with the Society about the flat to be given to her was sufficient to lead to his *automatic disqualification.*

In any event, the conduct and behaviour of Khan, having regard to the facts admitted by him in his affidavit, were such, that the Society had clearly succeeded in establishing a real danger of bias under the Rule in *R. v. Gough*, in other words, a case of *non-automatic disqualification.*

The next question to be considered is what is the effect of our conclusion regarding the Miftah Khan factor on the decision of the Council through its Planning Authority made on 20 July 1993 whereby extension of planning permission subject to the disputed condition was granted?

In particular, are we entitled to sever the disputed condition from the rest of the planning permission thus leaving the planning permission standing subject only to the remaining condition, as did the Court of Appeal or must we quash the decision of the Council, which, properly understood is a composite one, involving extension of planning permission subject to the disputed condition – thus leaving the Society with no planning permission? As Glynn-Jones J said in *Hall's case* [1963] 61 LGR 508 in determining whether or not the grant of planning permission fails when conditions are held to be invalid it would be necessary in each case to consider all the particular circumstances.

Need we say, this is a question of cardinal importance to this appeal and so, the next topic to be logically considered is the doctrine of Severance.

(7) Can The Disputed Condition Be Severed From The Rest Of The Planning Permission? ("The Severance Point")

The Court of Appeal invoked the Doctrine of Severance, and nullified the disputed condition *only* thus leaving intact the decision to extend the planning permission. Their reasoning was as follows:

> Mr. Das contended that if we were minded to grant relief the whole of the decision should be quashed and not just the second condition. He says the decision cannot be severable. He also submitted that the entire matter should be referred back to the Respondent for reconsideration.
>
> We think that a distinction should be made here between the said planning permission, the seven conditions to which it was originally subject, and the additional conditions imposed. We also think a distinction should be drawn between that which is void and that which should be cured by judicial review. *Hall and G. Ltd. v. Shoreham-by-Sea U.D.C.* [1964] 1 All E.R. 1 is an example of the planning permission having to be avoided because the offensive conditions were fundamental and inseparable from it. *D.P.P. v. Hutchinson* [1990] 2 All E.R. 836 dealt with the severability not of planning conditions but of a Bye-law, parts of which exceeded the powers conferred by the empowering statute. We accept and adopt the statement in *Administrative Law* by Sir William Wade 6th Edition page 338 reading as follows:

> An administrative act may be partially good and partially bad. It often happens that a tribunal or authority makes a proper order but adds some direction or condition which is beyond its powers. If the bad can be cleanly severed from the good, the court will quash the bad part only and leave the good standing.

> The attack here was only against the second condition. It is severable from the rest of the said planning permission.

It is clear law that where a license (see, e.g. *R. v. North Herfordshire D.C. ex p. Cabbald* [1985] 3 All ER 486) or Court order (see e.g. *R. v. Southwark Crown Court ex p. Customs and Excise Commissioners* [1989] 3 WLR 1054) or planning permission (see e.g. *Hartnell v. Minister of Housing and Local Government* [1965] AC 1134; *Mixnam's Properties Ltd. v. Chertsey U.D.C.* [1965] 3 AC 735; *Kingsway v. Kent County Council* [1971] AC 72) is granted but conditions attached to it are unlawful, the courts may, in appropriate circumstances, give effect to the *intra vires* portions of an act and deny validity only to those portions which are *ultra vires.* But, where a condition attached to a grant of planning permission which is held to be *ultra vires* is important and not trivial, the Court must quash the composite decision including the grant of planning permission and not simply the condition. (See, *British Airports Authority & Ors. v. Secretary of State for Scotland & Anor.* [1979] SLT 197).

Certainly, *Mixnam* shows that conditions attached to a planning permission may be beyond the powers conferred by the relevant legislation upon the local authority and, therefore, *ultra vires,* but yet the permission itself may remain perfectly lawful.

But, in the present case, we are *not* concerned with such a situation since, in our view, on the face of the relevant legislation, the Council had *the power* to impose the disputed condition upon granting the application for extension of planning permission. Instead, as we have said, what we *are* concerned with is the effect of the violation of the bias rule of natural justice on the decision of the Planning Committee on 20 July 1993, granting extension of planning permission subject to the disputed condition.

The nub of this part of the appeal, therefore, is that having found that the decision of the Planning Committee on 20 July 1993 was invalidated by bias, are we in position to perform feats of surgery, as did the Court of Appeal, by severing the disputed condition thus leaving the Society with an extension of planning permission not subject to it?

In considering this part of the case, we have not overlooked the point made by Mr. Sethu that planning permission confers benefits on the grantee and should not be readily invalidated. (See, *Newbury District Counsel, ex p. Chieveley Parish Council* [1998] Gazette 3 September 1998). We would go further, and say, that planning permission confers upon a grantee a right *in rem*, that is to say, a right maintainable against the whole world.

But, cases such as *R. v. Hendon D.C. ex p. Chorley* [1933] 2 QB 696 show that the existence of a personal financial interest on the part of a member of the relevant committee or an official would invalidate a planning permission. In that case X had agreed to buy land from Y subject to the condition that the council's consent was first obtained to X's proposal to erect buildings thereon. One of the councillors who voted in favour of the resolution granting X permission had been acting as Y's estate agent in the transaction. On this ground alone, *certiorari* went to quash the council's resolution granting the permission. It is significant that the financial interest of *one* member was enough to invalidate the council's decision. Similarly, other interests such as family connections, may also invalidate a decision, the test applied in one case being whether a reasonable man in possession of all the facts known to the reviewing Court would consider there to be a reasonable suspicion of bias. (See, *R. v. Liverpool City JJ* [1983] 1 All ER 490).

To revert to the instant case, the decision of the Council through its Planning Committee on 20 July 1993, granted extension of planning permission subject to the disputed condition. This would mean that the source of authority for the grant of extension of planning permission *and* the imposition of the disputed condition was this decision. If, therefore, this decision was invalidated by the Miftah Khan factor, then the whole of the decision is null and void with the inevitable result that source of authority for the extension of planning permission and the imposition of the disputed condition, is gone. To put it, in general terms, the invalidity goes to the root of the planning permission.

Not to put too fine a point on it, it will be recalled that Miftah Khan had freely admitted that he had attended every meeting of the Council at which the Society's planning permission was discussed, to wit, on 5 September 1991, 20 July 1993, 5 September 1993 and 20 September 1993 and had participated therein. We must interpolate to add that his presence even without participation would have been equally objectionable. So, for example, in *Cooper v. Wilson* [1937] 2 KB 309, C, a policeman had been dismissed by his chief constable. Although the Chief Constable was, of course, not a member of the Watch Committee, he was present while it was deliberating on C's appeal. C then sued the Chief Constable and the Watch Committee claiming declarations. It was held by the Court of Appeal, that the Committee's decision to dismiss C's appeal was void. Even though the Chief Constable had taken no part in

its deliberations, it was enough that there was a risk of bias through his presence. *Cooper v. Wilson*, was followed in *Rohana bte. Ariffin & Anor. v. University Sains Malaysia* [1989] 1 MLJ 487.

We would add, that quite apart from para 8 of the Schedule, an attempt was also made by Mr. Sethu to salvage the order of the Court of Appeal by reference to the judgment of Edgar Joseph (Jr.) FCJ in the case of *R. Ramachandran v. The Industrial Court of Malaysia* [1997] 1 MLJ 145 where the concept of moulding relief was accepted by the Federal Court. The question there was whether the court should itself assess the compensation payable to the appellant for loss of service or send the matter back to the tribunal for this purpose. The Court chose the first alternative. Its reasoning is reflected in the passages of his judgment at 198 B line 3 to F 4.

With respect, it must be self-evident from the passages referred to above, that the situation in *Ramachandran's* case, was poles apart from that of the present case. No question of extension of time – always a creature of statute – was involved there and the Judge was careful to emphasise "the very special circumstances" of the case, which he spelt out (see *ibid* at p. 198 B to F).

Our Conclusion On Question (7) ("The Severance Point")

For the reasons stated, applying the test in *R. v. Gough*, we are driven to the inevitable conclusion that the bias rule of natural justice must be strictly enforced. We regret, therefore, that we are unable to agree with the Court of Appeal that the disputed condition is severable from the rest of the planning permission and that, it alone, should be quashed, thus leaving the Society with an extension of planning permission not subject to it. We therefore, hold that the Society is left without planning permission.

The next question we should like to address is: Did the Court of Appeal have the power to extend time in respect of the planning permission which had expired?

(8) Could The Court Of Appeal Extend The Life Of The Lapsed Planning Permission ("The Extension Of Time Point")?

The question of extension of time only arises if, contrary to our primary view, the Court of Appeal was right in resorting to the doctrine of severance and excising from the decision of the Council, the disputed condition. Nevertheless, as the question involved is, in our view, free from difficulty, of general importance, was argued, and we have had the advantage of the views of the Court of Appeal thereon, we consider it right to deal with it.

The Order of the Court of Appeal extended the planning permission granted on 6 September 1991, but with the disputed condition excised, for one year from the date of the service on the Society of the order extracted pursuant to its judgment, was purportedly made by virtue of Para 8 of the Schedule to the Courts of Judicature Act, 1964, entitled "Additional Powers of the High Court", immediately raises the question whether the Court of Appeal did indeed have the power to do so?

It is trite law that the power to extend time must be a creature of statute and as long ago as 1960 in the well known case of *Lee Lee Cheng (f) v. Seow Peng Kwang* [1960] MLJ 1, the Federation of Malaya Court of Appeal was concerned with the question of the effect of para 12 of the Second Schedule of the Courts Ordinance, 1948, (in *pari materia* with para 8 of the Schedule to the Courts of Judicature Act, 1964). The point which concerns us was well captured by Rigby J, when he said:

> In my view the judgment of Barakbah, J. was entirely correct in holding that item 12 in the Second Schedule of the Courts Ordinance, 1948, is merely declaratory of the jurisdiction of the High Court to enlarge the time prescribed by any written law for doing any act or taking any proceeding, always providing there is express provision in the particular written law itself which enables such time to be so enlarged. Any other construction of the Section would, in my view, simply nullify the purpose and effect of the law relating to the limitation of actions.

There is nothing in the Town and Country Planning Act or the Local Government Act, or for that matter, any other written law, which enables time to be enlarged by the Court as to extinct planning permissions. The sole repository of this power is the local authority by virtue of s. 24(5) of the Act and no one else.

Our Conclusion On Question (8) ("The Extension Of Time Point")

With respect, therefore, we are unable to subscribe to the brusque common sense approach of the Court of Appeal in resorting to the doctrine of severance, and making the order for extension of time of planning permission and, had it been necessary for us to decide the question regarding this part of the case, we would unhesitatingly have answered it in the negative, that is to say, we consider that neither the Court of Appeal, nor for that matter, any Court had the power to make the order of extension of time. As we have said the sole repository of this power was the Council regard being had to the provisions of s. 24(5) of the Act. We are not at liberty to make an unauthorised amendment to a statutory provision.

The next topic to be logically addressed concerns the appropriate remedies we should decree.

(9) What Are The Remedies?

So, what then are the appropriate remedies which we should grant? In considering this question we have derived assistance from the following passages in the judgment of Lord Hoffmann speaking in the House of Lords in *Tesco Stores v. Secretary of State* [1995] 2 All ER 636, at p. 657:

> ... The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is *a question of planning judgment, which is entirely a matter for the planning authority.* Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process. (Italics supplied)
>
> That there is a distinction between whether something is a material consideration and the weight which should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. *If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State*. (Italics supplied)

In the field of planning law, the Court must remind itself of the fluid nature of statutory purposes and not to restrict itself by giving undue weight to the original intention of Parliament. It has been said, and we agree, that the goals of a scheme of public regulation are inevitably influenced by what administrators do, and by what they need to do to keep abreast of changing social and professional expectations. This explains why planning legislation invests in the planning authority a broad discretion.

It was submitted by Junior Counsel for the Council, Miss Karen Lim – and we agree – that with passage of time, as circumstances change, the conditions for planning permission may also change to accommodate the needs of a growing Municipality such as the Island of Penang; for example, Tenaga Nasional Berhad requirements regarding electricity, and the requirements of other relevant authorities having charge of sewerage, roads and piped water, to mention other examples.

Our Conclusion On Question (9) ("The Remedies Point")

At the end of the day, we must keep in the forefront of our minds what Lord Donaldson MR said in *R v. Panel of Take-overs and Mergers, ex p. Guinness plc* [1990] 1 QB 146, 160:

> ... the ultimate question would, as always, be whether something had gone wrong of a nature and degree which required the intervention of the Court and, if so, what form that intervention should take.

In the exceptional circumstances of this case, we order that the entire matter of the Society's application for extension of planning permission must be referred back to the Council with a direction to reconsider and re-determine it according to Law *after* the Society has been afforded a reasonable opportunity to adduce evidence and make representations with respect to conditions, if any, to be imposed upon the grant of such extension and after such evidence and representations have been duly and fairly considered by the Council through its Planning Authority. It goes without saying that, Miftah Khan, assuming him to be still a Councilor, shall not vote or be counted in the quorum or be even present at the meeting at which the application is being deliberated upon.

These are the appropriate orders to make in a planning case such as this because the Council can hear evidence as to the merits and take into account policy considerations which can never be static and which a Court of Law would be ill-equipped to consider.

That, however, is not the end of the matter for the question arises whether, upon the reconsideration and re-determination aforesaid, it would be open to the Council to re-impose the disputed condition or any other pricing condition? This is an important topic which we must next address.

(10) Can The Council Re-Impose The Disputed Condition? ("Consequential Matters")

In our view, having regard to the background facts leading up to the imposition of the disputed condition, as found by the Court of Appeal, and having regard to the unsatisfactory reasons advanced by the Director of Planning in his affidavit to which we have referred, it would *not* be open to the Council, upon reconsideration of the Society's application, to re-impose the disputed condition or to impose any other pricing condition to the like effect, because, to do so, would be to unreasonably exercise or abuse its powers or be unduly oppressive; and more particularly, it would be a violation of the legitimate expectations of the Society that it would retain or receive the benefit of extension of planning permission, free from any such condition which expectation the Court will not allow to be thwarted. There is also here an estoppel by reason of the conduct of the Council to which we have referred and discussed.

In the words of Lord Denning M.R. in *Laker Airways v. Department of Trade* [1977] 1 QB at 708 A:

> If it is found that the power has been exercised improperly or mistakenly so as to impinge unjustly on the legitimate rights or interests of the subject then these courts must so declare. They stand as ever between the executive and the subject, 'alert to see that any coercive action is justified in law': see *Liversidge v. Anderso*n [1942] A.C. 206, 244. To which, I would add alert to see that a discretionary power is not exceeded or misused.

The Result – Summary Of Conclusions

To summarise, the conclusions expressed above are as follows:

(1) the appeal is allowed to the following extent; the Judgment of Court of Appeal is varied as follows:

(a) the Orders of the Court of Appeal severing the disputed condition from the rest of the planning permission and quashing the disputed condition, and its further order, extending the lapsed planning permission granted on 6 September 1991 for one year from the date of the service on the Council of the order extracted pursuant to its judgment, are all set aside, thus leaving the Society without planning permission;

(b) the whole of the decision of the Council dated 20 July 1993 extending the planning permission granted to the Society on 6 September 1991 and imposing the disputed condition, are wholly null, void and of no effect;

(c) the entire matter of the Society's application for extension of planning permission shall be referred back to the Council with a direction to re-consider and re-determine it according to Law after the Society has been afforded a reasonable opportunity to adduce evidence and make representations with respect to conditions, if any, to be imposed upon the grant of such extension and after such evidence and representations have been duly and fairly considered by the Council;

(2) we declare that it shall *not* be open to the Council, upon reconsideration of the Society's application aforesaid, to re-impose the disputed condition or to impose any other pricing condition to the like effect;

(3) our conclusions and reasoning on (a) the Illegality Point; (b) the Alternative Remedy Point; (c) the *Fire Bricks* Case Point; (d) the Point concerning the Council's Power to impose the disputed condition; (e) the Point whether the Council's Power to impose the disputed condition was exercised unreasonably or abused; (f) the Legitimate Expectation Point; (g) the Duty to Give Reasons Point; (g) the Estoppel Point; (i) the Proportionality Point; and (j) the Point whether there was substance in the Plea of Bias, and if so, what were the consequences, all appear sufficiently under the appropriate sub-headings hereinbefore specifically set out and so it is unnecessary to repeat them.

As to costs, although the Council's appeal has been allowed to the extent aforesaid, because much time has been taken up in considering various complex questions of Law and Fact, which we have decided in favour of the Society, we consider that there should be no order as to costs at all levels and we so order. Deposit refunded to the Council.

In retrospect, this is a landmark appeal in the field of planning Law and Judicial Review in this country, the hearing of which occupied some 6 days. It was a veritable legal porcupine bristling with interesting and complex points of Law, well argued by Counsel on both sides. We therefore make no apologies for the acres of paper and streams of ink that have been devoted to the preparation of this unanimous judgment.

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